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No. 87-687

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

SESSIONS TANK LINERS, INC. d/b/a
SOUTHWEST TANK LINERS, INC.,
Petitioner and Cross-Respondent,

VS.

JOOR MANUFACTURING, INC.,
Respondent and Cross-Petitioner.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

A large number of States and subordinate governments adopt the Uniform Fire Code ("UFC"), a model public safety code promulgated by the Western Fire Chiefs Association ("WFCA"). Voting membership in WFCA is limited to elected or appointed fire or public safety officials. In an effort to influence state and local adoption of the UFC, cross-petitioner Joor Manufacturing (hereinafter "Joor") participated in non-voting committee activities of the WFCA and lobbyed voting members of WFCA. Cross-petitioner's activities were devoted to requiring physical inspection of the exterior of leaking underground tanks storing volatile and hazardous liquids before such tanks could be repaired through the application of a resin lining. There was evidence, believed by cross-petitioner, that to permit lining without such a physical inspection was unsafe. The questions presented are:

1. Whether petitioning of a private code-making association intended to ultimately influence the passage or enforcement of laws may be held an actionable restraint of trade leading to treble damages under the Sherman Act consistently with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and succeeding decisions of this Court further defining the doctrine of that case?

2. Whether petitioning of public safety officials before the UFC amendment requiring physical inspection of leaking tank exteriors prior to lining may be held an actionable restraint of trade leading to treble damages under the Sherman Act consistant with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and succeeding decisions of this Court further defining the doctrine of that case?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
JURISDICTION AND TIMELINESS OF APPEAL	3
STATEMENT OF THE CASE	3
THE FACTS	3
REASONS FOR GRANTING THE WRIT	7
1. *Indian Head* And *Sessions* Are Distinguishable Cases Presenting Different Questions For Review	9
2. The Primary Question Raised Uniquely By *Sessions* Was Properly Decided By The Court Of Appeals For The Ninth Circuit	10
3. The Holding Of *Sessions* That Petitioning Of Public Safety Officials Could Be An Actionable Restraint Under *Noerr* Is A Departure From Accepted Doctrine	11
CONCLUSION	13
Appendix A. Opinion of the Court of Appeals for the Ninth Circuit.	

TABLE OF AUTHORITIES

Cases

Page

In Re Airport Car Rental Antitrust Litigation, 693 F.2d 84, n.3 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 12

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) . i, 7, 8, 11, 12

Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938 (2d Cir. 1987), *cert. granted*, 56 U.S.L.W. 3202 (U.S. Oct. 5, 1987) (No. 87-157) 1, 7, 8, 9, 10, 13

Constitution

United States Constitution, First Amendment.... .....2, 4, 11, 12

Miscellaneous

House Select Committee on Small Business, *The Effect Upon Small Business of Voluntary Industrial Standards*, H.R. Rep. No. 1981, 90th Cong., 2d Sess. 3, 75 (1968) 10

Rules

Federal Rules of Appellate Procedure, Rule 4(c) 3

Federal Rules of Civil Procedure,
Rule 54 3
Rule 54(b) 3
Rule 56 3

Statutes

The Sherman Act, United States Code, Title 15,
Section 1 ..... 2, 6
Section 2 ..... 2, 6
Section 15 3
Section 26 3

TABLE OF AUTHORITIES

STATUTES

	Page
United States Code, Title 18, Section 1254(a) ...	2
United States Code, Title 26, Section 1292(b) ...	3
United States Code, Title 28,	
Section 1292(b)	3
Section 2107	3

Textbook

Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 Texas Law Review 1329, 1339 (1978)	10

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OPINIONS BELOW[1]

The opinion of the court of Appeals for the Ninth Circuit is reported at 827 F.2d 458 (9th Cir. 1987) and appears as Appendix A, pp. a1-a24. The Opinion of the District Court granting partial summary against Southwest is published in 1986-1 Trade Cas. (CCH) ¶ 66,989 (C.D. Cal. 1986) and appears as Appendix A, pp. a25-a36.

[1]The opinion of the Court of Appeals for the Second Circuit in *Indian Head, Inc. v. Allied Tube & Conduit Corp.* is reported at 817 F.2d 938 (2d Cir. 1987), *cert granted*, 56 U.S.L.W. 3202 (U.S. Oct. 5, 1987) (No. 87-157) and appears as Appendix A, pp. a37-a57.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 2, 1987. No petition for rehearing was filed. Jurisdiction of this Court is founded upon 18 U.S.C. § 1254(a).

This cross-petition for writ of certiorari is filed under Rule 19.5. The petition for writ of certiorari in connection with which this cross-petition is filed was received October 30, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

The Sherman Act, 15, U.S.C. § 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal.

The Sherman Act, 15 U.S.C. § 2 provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or

by imprisonment not exceeding three years, or by both said punishments, in the descretion of the Court.

JURISDICTION AND TIMELINESS OF APPEAL

Southwest appealed from a decision of the United States District Court for the Central District of California granting partial summary judgment against it pursuant to Rule 56, Fed.R.Civ.P. The trial court had subject matter jurisdiction over the proceedings below pursuant to 15 U.S.C. §§ 15, 26.

The Court of Appeals for the Ninth Circuit had jurisdiction of the appeal from the District Court's decision pursuant to either Rule 54, Fed.R.Civ.P. or 26 U.S.C. § 1292(b). On June 10, 1986, the District Court entered an order directing entry of partial summary judgment in favor of Joor pursuant to Fed.R.Civ.P. 54(b) and certifying its order for appeal pursuant to 28 U.S.C. § 1292(b). On July 9, 1986, Southwest timely filed its notice of appeal pursuant to 28 U.S.C. § 2107 and Rule 4(c), Fed.R.App.P. On October 7, 1986, the Court of Appeals for the Ninth Circuit entered an order granting Southwest's petition to appeal under 28 U.S.C. § 1292(b). The opinion of the Court of Appeals for the Ninth Circuit which is the subject of this Cross-Petition was filed September 2, 1987.

STATEMENT OF THE CASE

THE FACTS

This cross-petition raises novel questions of law and economic policy relating to the antitrust laws, and additionally requires the balancing of the interests favoring competitive markets under the Sherman Act with those

interests favoring a free market place of ideas under the First Amendment.

The important issues raised in this petition have contrastingly humble origins.

The facts underlying this petition are well stated in the opinion of the Court of Appeals. (App. A, pp. a5-a7.) That account is quoted here for convenience:

"Joor manufactures metal tanks used for the underground storage of hazardous fluids, principally gasoline. Sessions repairs leaks in these tanks by puncturing them while still underground and coating their inner surface with an epoxy lining. Removing a tank to repair it aboveground is so costly that customers will ordinarily buy new tanks if this underground lining process is not available. Thus appellant's repairs compete directly with Joor's sales.

"According to Sessions, tank lining has been in successful use for some thirty years. In 1980, however, demand for appellant's service began to decline, particularly in California. At the same time, fire department officials in various California localities began denying Sessions the permit necessary to perform its work.

"The reason, Sessions alleges, has its source in a proposed amendment to the WFCA's Uniform Fire Code (the Code) a model fire safety code highly influential in the western states.[2] The WFCA is a nonprofit, voluntary

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[2]The record does not make clear exactly which states, counties or municipalities have enacted the Code into law, or to what extent local legislatures have deviated from its terms when adopting it. According to the WFCA, the Code "has been adopted in a majority of the counties, cities and other political subdivisions in the ten western United States (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah and Washington) and is widely adopted in the thirteen southwestern and mid-western states." Brief of the WFCA

membership organization established in 1891. Although it has no official governmental status, *the WFCA limits its voting membership exclusively to public officials, most of whom are involved in enforcing fire safety regulations in their respective jurisdictions.* The Code has no legal force until local governments choose to adopt or enforce its provisions. [Emphasis added.]

"In 1978 the WFCA created a subcommittee to revise Article 79 of the Code, which deals with the use and storage of inflammable fluids.[3] One of the Article 79 subcommittee's tasks was to develop safety standards for the underground repair of storage tanks. The alleged safety problem posed by underground repair lies in the possibility that corrosion — which might have caused the leakage — will go undetected. Sessions' epoxy lining

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et al., amici curiae, at 5. In addition, local fire officials may enforce Code provisions or standards even when their respective localities have not enacted these provisions or standards into law.

[3]The WFCA revises the Code according to the following procedures. An ad hoc subcommittee is established to consider particular issues. Representatives of private industry are often invited to serve thereon. At the time of the events in question, such private industry members had full voting powers within the subcommittee on which they serve. (The WFCA has now changed its rules so that private industry representatives no longer have voting power even at the subcommittee level.) If a subcommittee votes to propose an amendment to the Code, the proposal is referred to the WFCA's standing Code Committee, which publishes a notice in two national trade journals and then holds meetings on the proposed amendment. Anyone may attend these hearings, speak and present evidence, but only active WFCA members — no private industry representatives — may vote. After the hearings, both the original proposal and the Code committee recommendation are again published in the trade journals. Finally, at the WFCA annual conference, where once more any one may participate but only WFCA members may vote, the entire body of the WFCA approves or rejects the proposed amendment.

stops leaks but does not strengthen the tank walls. Joor insists that aboveground inspection is necessary to ascertain whether the leaking tank's walls can continue to withstand ground pressure.

"Joor's president, Howard Robbins, became a member of the Article 79 subcommittee and there argued strenuously that the underground tank lining process should be completely prohibited. On March 17, 1981, at a subcommittee meeting, Robbins moved to amend the Code to require leaking tanks to be removed from the ground. The proposed amendment was calculated to prevent Sessions and similar companies from repairing tanks. Removing a tank from the ground prior to the tank lining process would destroy the cost advantage of that process. Robbins' motion carried unanimously.

"Neither Sessions nor any other firm in the tank lining field had a voting representative on the Article 79 subcommittee. However, Sessions was not barred entirely from participating in the subcommittee's deliberations. It was permitted to submit materials in the subcommittee and to have a representative offer an oral defense of its process at the March 17 meeting. Subsequently, representatives for Sessions and other tank lining companies presented arguments and evidence at Code Committee meetings and at the WFCA annual conference. Nonetheless, these two bodies both ratified the subcommittee's amendment, which thereby became part of the Code in 1982.

"Sessions brought suit under sections 1 and 2 of the Sherman Act, alleging that Joor combined with other tank manufacturing interests to procure an unreasonable restraint of trade, and that Joor was attempting to monopolize the relevant market. Sessions further accused Robbins of making misrepresentations to fire officials inside and outside the WFCA, of conspiring with the

same, and of denying Sessions access to the Article 79 subcommittee."

REASONS FOR GRANTING THE WRIT

This cross-petition, combined with *Indian Head,* squarely raises three distinct issues of first impression for this Court.

1. Whether petitioning of a private code-making association intended to ultimately influence the passage or enforcement of laws could be held to be an actionable restraint of trade under *Noerr* where the petitioning tactics used were found to "subvert" the association rules? (*Indian Head*);

2. Whether petitioning of a private code-making association intended to ultimately influence the passage or enforcement of laws could be held to be an actionable restraint of trade under *Noerr* where the petitioning tactics were consistent with association rules and the integrity of the ultimate decision making process of the association is not impunged? (*Sessions*);

3. Whether petitioning of public safety officials intended to directly influence the passage or enforcement of laws could be held to be an actionable restraint of trade under *Noerr*? (*Sessions*)

In *Indian Head,* the Court of Appeals for the Second Circuit held that the conduct framed by the first question presented above is not immunized by *Noerr-Pennington.*

In the instant case, the Court of Appeals for the Ninth Circuit reached a conflicting result, holding that the conduct framed by the second question presented above is immunized by *Noerr-Pennington.*

Thirdly, the Ninth Circuit held the conduct framed by the remaining question presented above may not be

immunized under *Noerr-Pennington* under certain limited circumstances. This holding is such a departure from the accepted doctrine under *Noerr* as to call for an exercise of this Court's power of supervision.

The tension between *Indian Head* and *Sessions* is best and most clearly expressed by note 6 of the Sessions opinion.[4] In that note, the Ninth Circuit observed that the Second Circuit opinion ". . . gave short shrift to antitrust defendants' petitioning rights in situations where they had not 'subverted' the organization's code promulgating process, and it makes no mention at all of this associational rights . . . ." Additionally, the Ninth Circuit was properly troubled by the *Indian Head* holding which would not permit a defendant to justify the ultimate result of the petitioning by showing such result was based upon an objective belief that barred product was unsafe.

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[4]That note reads: "A few other observations with respect to the *Indian Head* case may be helpful. The Second Circuit stressed that private bodies, unlike governmental actors, cannot be assumed to be acting in the public interest. See 817 F.2d at 943-44. True or not, this point overemphasizes the policy aspect of the *Noerr* doctrine at the expense of its other components. The court gave short shrift to antitrust defendants' petitioning rights in situations where they have not "subverted" the organization's code-promulgating process, and it made no mention at all of their associational rights, which are plainly implicated. More troubling still, the court held that defendant could not try to justify the organization's failure to approve plaintiff's product (which formed the basis of the lawsuit) by showing that plaintiff's product was in fact unsafe. "The 'objective validity' of a restrain of trade has never been a defense to an antitrust charge . . . ." *Id.* at 947. Thus *Indian Head* in effect suggests that defendants may owe treble damages simply for bringing forward undisputed evidence that a rival's product is actually hazardous. The *Noerr* doctrine exists precisely to prohibit such a result."

1. *Indian Head* And *Sessions* Are Distinguishable Cases Presenting Different Questions For Review.

The broad issue of antitrust immunity for certain petitioning activities before private code-making associations is one of first impression before this Court.

Indian Head presents one focused question of whether immunity is proper where the petitioning tactics are found to subvert the association rules. This question is not presented by the facts in *Sessions*. A determination of that issue alone does not require the granting of either the *Sessions* petition or this cross-petition.

Indian Head involved a private code-making association with voting membership made primarily of self-interested private parties. These parties could and did recruit additional voters by simply paying dues and arranging for the voters to attend particular meetings.

In *Sessions*, voting membership of the WFCA was limited to elected or appointed public safety officials. Interested private parties could attend meetings and recruit additional supporters, but could not "stack" the actual vote.

Indian Head involved an advocacy supported by facts, but not necessarily governed by the facts. The "voters" assembled by the various sides of the battle were hired bodies and were not informed, active advocates.

In *Sessions*, the positions for and against tank lining were presented by informed advocates to the voting membership composed exclusively of public safety officials. That independent voting membership made the decision, not the faction hiring the most dues-paying bodies in attendance.

2. The Primary Question Raised Uniquely By *Sessions* Was Properly Decided By The Court Of Appeals For The Ninth Circuit.

The primary question uniquely addressed by the Court of Appeals in *Sessions* was properly decided. Review by this Court is not necessary to correct any error by the Ninth Circuit.

However, the opinion in *Indian Head* creates an uncertainty which may best be addressed by a review of both cases by this Court.

The legal and economic significance of the issues raised by both cases is best illustrated by the participation by *amicus curiae* below. The Antitrust Division of the Department of Justice, the Federal Trade Commission and virtually every national and regional model code organization submitted *amicus* briefs in either *Indian Head* or *Sessions* or both.

The economic significance of these model code organizations cannot be overstated. The development of a coherent structure of regional and national associations has taken decades and has made enormous contributions to cost containment and efficiencies in local government, the construction industry and the insurance industry. *See, e.g.*, House Select Comm. on Small Business, *The Effect Upon Small Business of Voluntary Industrial Standards*, H.R.Rep. No. 1981, 90th Cong., 2d Sess. 3, 75 (1968) and Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 Tex.L.Rev. 1329, 1339 (1978).

The hundreds of volunteer, industry and public sector participants who are the model code organizations will not serve if exposed to the threat of antitrust liability for their good faith participation in activities not involving subversion of the organization's code-promulgating

process. Within these organizations, and the testing laboratories, universities and local governments which all participate in the process, differences of opinion exist. To many of the issues confronted there is no necessarily "right" or "wrong" response. The process is one of information gathering and decision making. The decisions are often difficult, involving judgments of cost, public safety and acceptability of certain risks.

These are political issues upon which reasonable men may differ. The dialogue is political in nature, involving fundamental First Amendment rights of speech, petitioning and assembly.

Participants in this process should know in the clearest and least ambiguous way possible that this activity is encouraged and is not wrongfully chilled by the potential application of inappropriate antitrust liability.

Such a result is best reached by an opinion by this Court squarely addressing the fundamental issue raised uniquely by *Sessions*.

3. The Holding Of *Sessions* That Petitioning Of Public Safety Officials Could Be An Actionable Restraint Under *Noerr* Is A Departure From Accepted Doctrine.

The Court of Appeals in *Sessions* held that alleged misrepresentations made to an executive official in an administrative capacity will be actionable in antitrust despite the *Noerr-Pennington* doctrine. The lower court attempted to distinguish between legislative (immunity), judicial (no immunity) and executive (perhaps immunity) functions of government. More specifically, the *Sessions* court plumbed the depths of the administrative or policy-oriented functions of executive officials, and distinguished the policy-oriented discretionary enforcement from pure administration of laws.

This is a "distinction" which is impossible to meaningfully define, is inconsistent with the fundamental thrust of *Noerr* and has the potential of yielding the very chilling effect *Noerr* was intended to prevent.

If *Noerr* exists to protect the constitutional right to petition the government, that government includes the administrative branch — be that the President or a local mayor. To create the rule that misrepresentations in lobbying of the executive generate antitrust exposure where the action sought is more administrative than legislative substitutes conclusory labels for reason.

There are circumstances where petitioning the executive in its administrative capacity is part of a highly political dialogue affecting policy determinations or portions of a larger political effort.

The appropriate analysis is to simply reaffirm the "Sham" doctrine, immunizing that activity which advances the First Amendment interests of *Noerr* and not immunizing those activities which make no contribution to the political fabric. See *In re Airport Car Rental Antitrust Litigation,* 693 F.2d 84, 86 n.3 (9th Cir. 1982), *cert. denied,* 462 U.S. 1133. If error is to be made in this balance, the doubt must favor the fundamental First Amendment rights over the statutory concerns of the Sherman Act.

CONCLUSION

The issues raised by *Sessions* and *Indian Head* are of great economic significance to a body of model code-making organizations and the many volunteer participants in that process. The conflict between the Ninth and Second Circuits and the uncertainty created by the Ninth Circuit's holding on the second question presented by this cross-petition are best resolved by a clear, unambiguous resolution by this Court.

Cross-petitioner respectfully requests that this cross-petition be granted.

Dated: November 27, 1987

Respectfully submitted,

By: DAVID E. LUNDIN

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Nos. 86-6208; 86-6470
D.C. No. CV-84-6363-MRP

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SESSIONS TANK LINERS, INC. dba
SOUTHWEST TANK LINERS, INC.,
Plaintiff-Appellant,

vs.

JOOR MANUFACTURING, INC., et al.,
Defendants-Appellees.

Argued and Submitted
April 8, 1987 — Pasadena, California

Filed September 2, 1987

Before: Joseph T. Sneed, Robert Boochever and
David R. Thompson, Circuit Judges.

Opinion by Judge Sneed

Appeals from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

OPINION

SUMMARY

Antitrust

Appeal from grant of summary judgment. Affirmed in part, reversed and remanded in part.

Appellant Sessions Tank Liners, Inc. (Sessions) is in the business of coating and repairing underground gasoline storage tanks, making replacement unnecessary. Appellee Joor Manufacturing, Inc. (Joor) provides

replacement tanks, and is therefore in competition with Sessions. Sessions alleged that its business in California began to decline due to Joor's proposed amendment to the Western Fire Chief's Association (WFCA) Uniform Fire Code. Joor's president had argued strenuously that the underground tank lining process (used by Sessions) should be completely prohibited, and his position was adopted and made part of the Code. Sessions brought suit under the Sherman Act, alleging that Joor combined with other tank manufacturing interests to procure an unreasonable restraint of trade, and that Joor was attempting to monopolize the relevant market. The district judge granted Joor's motion for summary judgment, ruling that the *Noerr-Pennington* doctrine exempted Joor's conduct from antitrust liability.

[1] The *Noerr-Pennington* doctrine, which exempts the petitioning of governmental bodies from antitrust action, applies to proper lobbying of a private association engaged in promulgating an important model code to influence legislative and executive decisions. [2] Although Joor's efforts were directed at an ostensibly private body, they were without doubt part of a plan ultimately to procure favorable legislation by local governmental bodies who look to the Uniform Fire Code for guidance. [3] First amendment purposes are served by extending *Noerr-Pennington* to the circumstances of this case, [4] and the extension would also promote the affective operation of our political processes. [5] Joor's president's proposal had no legal force until adopted by local legislatures, and acts of these governmental officials should not make Joor liable under the Sherman Act.

[6] The analysis of a recent second circuit case finding that *Noerr-Pennington* does not apply to a case involving improper lobbying of a model code association much like

the WFCA was flawed because the proper focus of such subversion should be the applicability of *Noerr-Pennington's* exceptions. [7] Session's argument that *Noerr-Pennington's* sham exception applies because it was denied access to the WFCA because it had no voting representative fails because there is no evidence that Joor was responsible for this exclusion. [8] Also, despite the fact that the position of Joor's president on the subcommittee recommending the change in the code creates an appearance of impropriety, Sessions has not made a sufficient showing that Joor or other tank manufacturing interests combined with Joor to capture the WFCA. [9] Sessions further complained that certain statements made by Joor were deceptive, but the district court concluded that the statements were simply part of a reasoned argument, and that while Joor might have been wrong, the WFCA could not have been misled by what Joor said. [10] It is possible that the court's conclusion was erroneous for summary judgment purposes, however. [11] Although alleged misrepresentations in a publicity campaign designed to influence legislation are political activity and not actionable under the Sherman Act, [12] that principle does not extend to Joor's alleged misrepresentations made outside the WFCA lobbying process, before the Code was amended, to local fire officials who thereafter denied Sessions the requisite permits for carrying on its work. [13] Misrepresentations made to an executive official falls between the roles established in the legislative context (where misrepresentations are not actionable) and the adjudicative context (where they are actionable). [14] If Sessions's allegations are true, the fire officials were asked to respond in an administrative capacity. These allegations state a limited sham exception claim.

COUNSEL

Maxwell M. Blecher and Christopher Layne, Los Angeles, California, for the plaintiff-appellant.

David E. Lundin, San Diego, California, for the defendants-appellees.

William J. Meeske, Los Angeles, California, Catherine G. O'Sullivan and Dean C. Graybill, Washington, D.C., for the amici curiae.

OPINION

SNEED, Circuit Judge:

Joor Manufacturing (Joor) successfully sought to have the Western Fire Chiefs Association (WFCA) amend its influential model fire code in a manner disadvantageous to Sessions Tank Liners, Inc. (Sessions), a competitor. Sessions sued Joor for violating the Sherman Act. The district court granted the defendant summary judgment, ruling that the *Noerr-Pennington* doctrine exempted Joor's conduct from antitrust liability. Sessions appeals.

We conclude that legitimate efforts to influence or lobby private, model code associations *are* protected by the *Noerr-Pennington* doctrine. However, we also conclude that "abuses" of the code-promulgating process designed primarily to harm competitors are a "sham" and fall outside *Noerr-Pennington* protection. Because Sessions has stated a very limited "sham" exception claim not considered by the court below, we reverse and remand for further proceedings.

I.

FACTS

Joor manufactures metal tanks used for the underground storage of hazardous fluids, principally gasoline. Sessions repairs leaks in these tanks by puncturing them while still underground and coating their inner surface with an epoxy lining. Removing a tank to repair it aboveground is so costly that customers will ordinarily buy new tanks if this underground lining process is not available. Thus appellant's repairs compete directly with Joor's sales.

According to Sessions, tank lining has been in successful use for some thirty years. In 1980, however, demand for appellant's service began to decline, particularly in California. At the same time, fire department officials in various California localities began denying Sessions the permit necessary to perform its work.

The reason, Sessions alleges, has its source in a proposed amendment to the WFCA's Uniform Fire Code (the Code), a model fire safety code highly influential in the western states.[1] The WFCA is a nonprofit, voluntary membership organization established in 1891. Although it has no official governmental status, the WFCA limits its

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[1]The record does not make clear exactly which states, counties or municipalities have enacted the Code into law, or to what extent local legislatures have deviated from its terms when adopting it. According to the WFCA, the Code "has been adopted in a majority of the counties, cities and other political subdivisions in the ten western United States (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah and Washington) and is widely adopted in the thirteen southwestern and mid-western states." Brief of the WFCA et al., amici curiae, at 5. In addition, local fire officials may enforce Code provisions or standards even when their respective localities have not enacted these provisions or standards into law.

voting membership exclusively to public officials, most of whom are involved in enforcing fire safety regulations in their respective jurisdictions. The Code has no legal force until local governments choose to adopt or enforce its provisions.

In 1978 the WFCA created a subcommittee to revise Article 79 of the Code, which deals with the use and storage of inflammable fluids.[2] One of the Article 79 subcommittee's tasks was to develop safety standards for the underground repair of storage tanks. The alleged safety problem posed by underground repair lies in the possibility that corrosion — which might have caused the leakage — will go undetected. Sessions' epoxy lining stops leaks but does not strengthen the tank walls. Joor insists that aboveground inspection is necessary to ascertain whether the leaking tank's walls can continue to withstand ground pressure.

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[2]The WFCA revises the Code according to the following procedures. An ad hoc subcommittee is established to consider particular issues. Representatives of private industry are often invited to serve thereon. At the time of the events in question, such private industry members had full voting powers within the subcommittee on which they served. (The WFCA has now changed its rules so that private industry representatives no longer have voting power even at the subcommittee level.) If a subcommittee votes to propose an amendment to the Code, the proposal is referred to the WFCA's standing Code Committee, which publishes a notice in two national trade journals and then holds meetings on the proposed amendment. Anyone may attend these hearings, speak and present evidence, but only active WFCA members — no private industry representatives — may vote. After the hearings, both the original proposal and the Code Committee recommendation are again published in the trade journals. Finally, at the WFCA annual conference, where once more anyone may participate but only WFCA members may vote, the entire body of the WFCA approves or rejects the proposed amendment.

Joor's president, Howard Robbins, became a member of the Article 79 subcommittee and there argued strenuously that the underground tank lining process should be completely prohibited. On March 17, 1981, at a subcommittee meeting, Robbins moved to amend the Code to require leaking tanks to be removed from the ground. The proposed amendment was calculated to prevent Sessions and similar companies from repairing tanks. Removing a tank from the ground prior to the tank lining process would destroy the cost advantage of that process. Robbins's motion carried unanimously.

Neither Sessions nor any other firm in the tank lining filed had a voting representative on the Article 79 subcommittee. However, Sessions was not barred entirely from participating in the subcommittee's deliberations. It was permitted to submit materials to the subcommittee and to have a representative offer an oral defense of its process at the March 17 meeting. Subsequently, representatives for Sessions and other tank lining companies presented arguments and evidence at the Code Committee meetings and at the WFCA annual conference. Nonetheless, these two bodies both ratified the subcommittee's amendment, which thereby became part of the Code in 1982.

Sessions brought suit under sections 1 and 2 of the Sherman Act, alleging that Joor combined with other tank manufacturing interests to procure an unreasonable restraint of trade, and that Joor was attempting to monopolize the relevant market. Sessions further accused Robbins of making misrepresentations to fire officials inside and outside the WFCA, of conspiring with the same, and of denying Sessions access to the Article 79 subcommittee.

II.

ISSUES

This case requires that we address two issues: (1) Assuming Robbins committed no improprieties in his lobbying efforts, can his successful persuasion of the WFCA constitute an antitrust violation under the Sherman Act? (2) If not, could the alleged improprieties by Robbins nonetheless state an antitrust claim? The first issue concerns the applicability of the *Noerr-Pennington* doctrine, and we find that *Noerr-Pennington* does apply in this context. The second concerns the applicability of that doctrine's "sham" exception, and we find that it too applies in this case, although only in a limited fashion.

III.

ANALYSIS

A. *Applicability of the Noerr-Pennington Doctrine*

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* 365 U.S. 127 (1961), defendants were a consortium of railroad interests that had successfully advocated legislation and executive action harmful to the emerging trucking industry. As here, plaintiff alleged that defendants' campaign had employed misrepresentations and other improper tactics. The first question addressed by the Court, however, was whether the Sherman Act prohibited the railroad's concerted lobbying efforts regardless of any improprieties: whether, that is, the lobbying itself was a "combination . . . in restraint of trade." 15 U.S.C. § 1.

The Court answered in the negative. The Sherman Act regulates "business activity," the Court held, not "politi-

cal activity." 365 U.S. at 137. The Court supported its conclusion with references to the constitutional right of petition, the value of public input into the political process, and legislative intent. *See id.* at 137-40.

In subsequent cases, the Court has made clear that *Noerr* applied to the petitioning of all governmental bodies. *See California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972); *United Mine Workers of Am. v. Pennington,* 381 U.S. 657, 670 (1965). In the case before us, however, the defendant's efforts were directed at a private association serving as a conduit to local legislatures and various governmental agents. If *Noerr-Pennington* does *not* apply here, then Joor could potentially be liable in antitrust simply for bringing to the WFCA's attention true and persuasive information about the safety hazards of a competitor's product — if Joor did so in combination with others or in an attempt to monopolize.

[1] We hold that *Noerr-Pennington* applies. It immunizes proper lobbying — either singly or in combination with others — of a private association engaged in promulgating an important model code to influence legislative and executive decisions.

Our holding rests on the various constitutional, policy and statutory considerations that underlie the *Noerr-Pennington* doctrine. Each of these considerations points clearly to the conclusion that *Noerr-Pennington* applies here.

1. *Constitutional interests.*

Noerr-Pennington exists in large part to protect the constitutional right to petition the government. *Noerr,* 365 U.S. at 138; *see City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 399 (1978). Joor argues that the

WFCA is in effect a "governmental" body exercising legislative or quasi-legislative powers. Sessions emphasizes the WFCA's formally private status. The labels "governmental" and "private" are, however, of limited utility.

Petitioning, for constitutional purposes, is not confined to entreating the government directly for relief. *See, e.g., Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar,* 377 U.S. 1, 7 (1964) (right to petition courts extended to workers' cooperative plan to advise one another of legal rights). Instead it encompasses appeals to some who are not governmental actors but who are nevertheless involved in the political process. Courts have repeatedly construed *Noerr-Pennington* in this manner.

In *Noerr* itself, an important component of the railroads' strategy was to exert pressure on governmental actors through the medium of public opinion. The Court held that the railroads' "publicity campaign to influence governmental action falls clearly into the category of political activity" shielded from antitrust liability. 365 U.S. at 140-41. We have applied *Noerr-Pennington* to an advertising campaign designed to influence a state's voter initiative process. *See Subscription T.V., Inc. v. Southern Cal. Theatre Owners Ass'n,* 576 F.2d 230, 232 (9th Cir. 1978). Finally, attempts to persuade private parties to join in a commercial boycott have also received *Noerr-Pennington* protection where the boycott was part of an effort to procure governmental action. *See, e.g., NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 907, 913-15 (1982); *Missouri v. National Org. for Women, Inc.,* 620 F.2d 1301, 1314 (8th Cir.), *cert. denied,* 449 U.S. 842 (1980).

[2] So too, Joor's efforts, albeit directed at an ostensibly private body, were without doubt part of a plan ultimately to procure favorable legislation. *See Federal*

Prescription Serv. Inc. v. American Pharmaceutical Ass'n, 471 F.Supp. 126, 130 (D.D.C. 1979) (Gesell, J.) (efforts to induce private medical associations to adopt favorable position protected under *Noerr* as "indirect attempts to influence governmental behavior"), *aff'd,* 663 F.2d 253, 262 n.6 (D.C. Cir. 1981) (alternative holding), *cert. denied,* 455 U.S. 928 (1982). The WFCA, whether designated as "public," "private," or even "quasi-governmental," plays an important and generally accepted role in the legislative process of the western states. The WFCA's substantial power and the Code's impact on local fire safety laws cannot be denied. For this reason the First Amendment right of petition affords protection to those seeking to influence the WFCA's decisions.

[3] Moreover, the right to petition is not the only First Amendment guarantee on which *Noerr-Pennington* rests. Rights of association are also implicated. *See California Motor Transport,* 404 U.S. at 510; *see also Claiborne,* 458 U.S. at 911 (rights of association and petition are inseparable). Joor was undoubtedly exercising its associational rights when it participated in a private organization to advance its legislative causes, whatever they may have been. *See NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460-61 (1958). Thus, First Amendment purposes would be served by extending *Noerr-Pennington* to the circumstances of this case.[3]

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[3]By itself, however, this conclusion does not end the inquiry into either *Noerr's* applicability or Joor's liability. Antitrust law often impinges on First Amendment interests. Boycotts include an associational component, and an agreement to fix prices may of course be speech. Nonetheless, these activities can in certain circumstances be prohibited. The Sherman Act necessarily presupposes that the "right of business entities to 'associate' to suppress competition may be

2. *Political Process Interests.*

[4] *Noerr-Pennington* also promotes the effective operation of our political processes. *See City of Lafayette,* 435 U.S. at 399; *In re Airport Car Rental Litigation,* 693 F.2d 84, 86 (9th Cir. 1982), *cert. denied,* 462 U.S. 1133 (1983). As the Court saw it in *Noerr,* "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." 365 U.S. at 137. Hence the result in *Noerr* was deemed necessary in order not to "deprive the government of a valuable source of information." *Id.* at 139. This concern too is applicable here.

Municipal and other local lawmakers rely on the WFCA's investigatory work in approving or disapproving myriad products and safety standards. In many instances it would be either impossible or inefficient for each local government to do otherwise. Most localities lack both the required resources and the talent. At the same time, it also would be inefficient if not impossible for particular businesses effectively to lobby every city or county council that adopts a fire code. *See Wheeling-Pittsburg Steel Corp. v. Allied Tube & Conduit Corp.,* 573 F.Supp.833, 838 (N.D. Ill. 1983). It follows that the WFCA renders valuable civic services and that the information it receives is quite important in the legislative process.

Within the WFCA, the various committees and subcommittees depend largely on the input of commercially self-interested parties for the expertise and research necessary to an informed decision. Self-interested information may be biased information, but "it is quite probably people with . . . a hope of personal advantage who provide

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curtailed." *Claiborne,* 458 U.S at 912; *see National Soc'y. of Prof. Eng'rs v. United States,* 435 U.S. 679, 697 (1978).

much of the information upon which governments must act." *Noerr,* 365 U.S. at 139. No one seriously assumes otherwise. The policy interests emphasized in *Noerr-Pennington* require that "free-flowing communication" be encouraged at all levels of governmental decisionmaking. *See Airport Car Rental Litigation,* 693 F.2d at 86. This policy also points in favor of *Noerr-Pennington's* applicability here.

3. *Statutory considerations.*

Finally, *Noerr-Pennington* rests on sound statutory grounds. To prevail under the Sherman Act, a plaintiff must not only show an unlawful restraint of trade, but also prove that the defendant is legally responsible for this restraint. The Sherman Act was not intended to make private parties liable, in the ordinary case, for governmental acts. Thus where the alleged restraint of trade "was the act of a public official who is not claimed to be a co-conspirator," a private defendant is not ordinarily liable for any damages caused thereby. *Pennington,* 381 U.S. at 671. A leading antitrust treatise has expressed this aspect of *Noerr-Pennington* in terms of "proximate cause":

> private parties may have influenced or persuaded the government to act, but the government's decision to act reflects an independent governmental choice, constituting a supervening "cause" that breaks the link between a private party's request and the plaintiff's injury.

P. Areeda & H. Hovenkamp, *Antitrust Law* 4 (Supp. 1986).[4] Within our own circuit, Judge Schwarzer has also

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[4] *See also* Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr,* 74 Geo. L.J. 65, 123 (1985). ("In the absence of egregious conduct, a governmental decision

emphasized this point. *See In re Airport Car Rental Antitrust Litigation,* 521 F. Supp. 568, 574 (N.D. Cal. 1981) ("if plaintiff suffered injury, it resulted from the acts of public officials . . . not the joint action of defendants"), *aff'd,* 693 F.2d 84 (9th Cir. 1982), *cert. denied,* 462 U.S. 1133 (1983).

[5] These considerations apply here. The Article 79 amendment as initially proposed by Joor's president and later accepted by the entire WFCA had no legal force and little injurious effect until it was adopted by local legislatures or enforced by local fire officials. Absent improprieties in the lobbying process, the acts of these governmentsl officials should not make Joor liable to Sessions under the Sherman Act. *See Noerr,* 365 U.S. at 135-36 (lobbying not actionable under Sherman Act because private parties not responsible for governmental restraints of trade).

For all the foregoing reasons, we conclude that *Noerr-Pennington* applies to Joor's lobbying efforts within the WFCA.

B. *Applicability of* Noerr-Pennington's *"Sham" Exceptions*

Sessions alternatively contends that Joor's conduct fell within the "sham" exception to the *Noerr-Pennington* doctrine. Robbins, Sessions alleges, deprived Sessions of meaningful access to the Article 79 subcommittee, conspired with various public fire officials, and misrepresented facts both inside and outside the WFCA. The crucial question, as we see it, is whether these asserted improprieties amounted to an "abuse of process," *Clipper Exxpress v. Rocky Mtn. Mot. Tariff Bur., Inc.,* 690 F.2d

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favorable to the petitioner will negate the proximate causation of any competitive injury.")

1240, 1259 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983); *Rodgers v. FTC*, 492 F.2d 228, 232 n.6 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974), corrupting the WFCA's decision. Before turning to each of appellant's allegations concerning Joor's abuse of the WFCA's process, a recent decision of the Second Circuit must be considered.[5]

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[5]We must also dispose of a preliminary objection. Joor succeeded in its efforts to amend the Code and thus local fire safety laws. It claims, therefore, that its petitioning was "genuine" and cannot be called a "sham." Not so.

To be sure, the clearest examples of sham petitioning are those in which the defendant's aim was to harm a competitor directly, not through the governmental process that he purported to invoke. *See, e.g., Energy Conservation, Inc. v. Heliodyne*, 698 F.2d 386, 389 (9th Cir. 1983) (baseless lawsuit allegedly designed to cause competitor expense and to generate adverse publicity). Perhaps because the term "sham" suggests this sort of situation, courts have sometimes asserted the mistaken proposition for which Joor contends. *See, e.g., WIXT Television, Inc. v. Meredith Corp.*, 506 F.Supp. 1003, 1032 (N.D.N.Y. 1980) (by definition a successful claim cannot be 'sham' ").

But there are other instances of sham petitioning in which the defendant genuinely seeks to achieve his governmental result, but does so *through improper means. See, e.g., Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 993-94 (9th Cir. 1979), (infringement suit based on fraudulently obtained patent is in "bad faith" and thus actionable in antitrust despite *Noerr*), *cert. denied*, 444 U.S. 1025 (1980); *Israel v. Baxter Labs., Inc.*, 466 F.2d 272, 278-79 (D.C. Cir. 1972) (misrepresentations inducing decision by administrative tribunal are actionable); *Outboard Marine Corp. v. Pezetel*, 474 F.Supp. 168, 179 & n.19 (D.Del. 1979). In such cases, the defendant may well succeed in procuring the desired governmental action, but has nonetheless misused his petitioning privilege. Thus defendant's "success or failure" is "one indicator" of whether his petitioning was a sham, *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 903 (9th Cir. 1983), but it is not dispositive.

Commentators occasionally urge courts to use the word "sham" only when referring to disingenuous — rather than unethical — peti-

1. *The Second Circuit case.*

The Second Circuit recently held *Noerr-Pennington* inapplicable in a case involving a model code association much like the WFCA. *See Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938, 942 (2d Cir. 1987). Superficially, *Indian Head* is contrary to our resolution of the first issue. In fact, however, our difference with the Second Circuit is not so deep as it might appear.

In *Indian Head*, defendant enrolled over 150 new members — most of whom were defendant's employees or agents — into the association and thereby won a pivotal vote by a slim majority. *Id.* at 940-41. The court found that *Noerr-Pennington* did not protect such conduct. We agree with this result; we do not agree, however, that the *Noerr-Pennington* doctrine is generally inapplicable to "model code association" cases.

[6] The essential flaw in the Second Circuit's analysis, as we see it, is that the court conflated the question of whether *Noerr-Pennington* applied with the distinct question of whether its "sham" exception was also applicable:

> Simply put, [defendant's] conduct did not constitute petitioning of the government within the meaning of *Noerr-Pennington:* rather, its conduct was a subversion of the legitimate purposes of the [model code association].

Indian Head, 817 F.2d at 945. Although we think the Second Circuit correctly denied immunity in *Indian Head*, the proper analysis of such "subversion" should

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tioning. But in both cases there is a pretense of seeking an independent, impartial decision. Thus both may fairly be called shams. *See* Hurwitz, *supra* note 4, at 109.

focus on the applicability of *Noerr-Pennington's* exceptions.

In saying this we recognize that the court in *Indian Head*, by restricting *Noerr-Pennington* to direct petitioning of the government, simplified the law by reducing drastically the scope of the "sham" exceptions. On the other hand, it complicted the law by requiring that the antitrust law develop the permissible practices of model code associations, their members, and participating nonmembers. It is unlikely that this exchange will result in a net simplification.[6]

2. *Exclusion from the Article 79 Subcommittee.*

[7] Sessions argues that it was denied meaningful access to the WFCA because it had no voting representative on the Article 79 subcommittee. Although denial of access to a decisionmaking tribunal can provide grounds for a "sham" exception claim, *see California Motor Trans-*

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[6] A few other observations with respect to the *Indian Head* case may be helpful. The Second Circuit stressed that private bodies, unlike governmental actors, cannot be assumed to be acting in the public interest. *See* 817 F.2d at 943-44. True or not, this point overemphasizes the policy aspect of the *Noerr* doctrine at the expense of its other components. The court gave short shrift to antitrust defendants' petitioning rights in situations where they had not "subverted" the organization's code-promulgating process, and it made no mention at all of their associational rights, which are plainly implicated. More troubling still, the court held that defendant could not try to justify the organization's failure to approve plaintiff's product (which formed the basis of the lawsuit) by showing that plaintiff's product was in fact unsafe: "The 'objective validity' of a restraint of trade has never been a defense to an antitrust charge . . . ." *Id.* at 947. Thus *Indian Head* in effect suggests that defendants may owe treble damages singly for bringing forward undisputed evidence that a rival's product is actually hazardous. The *Noerr* doctrine exists precisely to prohibit such a result.

port, 404 U.S. at 511-12, there can be no such claim here. Even if Sessions had a valid claim based on exclusion from the subcommittee, it has offered no evidence that Joor, rather than the WFCA, was responsible for this exclusion.

3. *Conspiracy.*

Antitust immunity under *Noerr-Pennington* does not extend to private parties who have entered into a "conspiracy" with governmental actors. *See Clipper Exxpress*, 690 F.2d at 1252 n.17; *Harman v. Valley Nat'l Bank*, 339 F.2d 564, 566 (9th Cir. 1964); P. Areeda & H. Hovenkamp, *Antitrust Law* 20-25 (Supp. 1986). Sessions introduced evidence below showing that Joor routinely entertained WFCA members and other local fire officials and provided them with certain "promotional gifts" such as coffee mugs and tape measures. The district court concluded, however, that this evidence failed to raise a triable issue of conspiracy. We agree.

Joor's efforts to curry favor with WFCA members may have been somewhat indelicate, but they provide no evidence of any unlawful agreement. *See Metro Cable Co. v. CATV, Inc.*, 516 F.2d 220, 230-31 (7th Cir. 1975) (on motion to dismiss) (allegations of campaign contributions, even if true, do not provide basis to withhold *Noerr-Pennington* immunity). Sessions, it develops, has offered no "specific factual support of the allegations of conspiracy," which this court requires for summary judgment purposes. *See Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 672 (9th Cir. 1980).

We must acknowledge, however, that the fact that Robbins sat on the very subcommittee that launched the amendment so favorable to Joor is unsettling. The spectre raised by this circumstance is that a body ostensibly

devoted to the public good — and possessed of considerable power because of this reputation — may have been "captured" by particular private interests. *See generally* Wiley, *A Capture Theory of Anti-trust Federalism*, 99 Harv. L. Rev. 713 (1986). Private standards-setting associations are particularly vulnerable to this sort of abuse. *See American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982). In essence this was the situation in *Indian Head*, where certain steel interests "took over" the model code association on the eve of a critical vote by enrolling hundreds of new members drawn from their own ranks. Such conduct constitutes exactly the kind of abuse of process that the "sham" exception to *Noerr-Pennington* serves to weed out.

[8] Despite the fact that Robbins's position on the Article 79 subcommittee creates an appearance of impropriety, Sessions has not made a sufficient showing that Joor or other tank manufacturing interests combined to capture the WFCA. Sessions has not alleged that anyone on the subcommittee other than Robbins had a financial interest in the proposed amendment. Nor has Sessions offered evidence that Robbins in fact exerted an improper influence over any WFCA members or exercised improper control over WFCA procedures or voting. The entire WFCA membership, consisting exclusively of public officials, had final authority to accept or reject the proposed amendment, and Sessions has provided us with no reason to doubt their integrity.[7]

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[7]If the WFCA were an association of private interests putatively engaged in self-regulation, Sessions would have a very different antitrust claim. Joor's liability would probably not be altered, but the WFCA as a whole might then be subject to suit. *Cf. United States v. National Soc'y of Professional Eng'rs.* 435 U.S. 679 (1978) (engineers' association was liable in antitrust for taking position that competitive

4. *Misrepresentation.*

The gravamen of Sessions's accusations of impropriety is that Joor persuaded the WFCA by the use of deceptive material. In particular, Sessions challenges a letter that Robbins submitted to the Article 79 subcommittee in which he summarized his objections to the underground tank lining process. Robbins wrote that:

[T]wo certainties exist:

1. When leakage is encountered, weakened metal exists, and,

2. It is difficult to ascertain remaining metal thickness from an observation point inside the tank.

> Acceptance of tank lining, as is being proposed, implies the discarding of UL 58 or equivalent strength requirements.

E.R. at 702-03.

According to Sessions, all three of these representations were false. First, there may be no weakness in the metal of a leaking tank. Second, ultrasonic testing can accurately measure the thickness of the tank walls while the tank is still underground. Finally (still acording to Sessions), Robbins's conclusion falsely suggests that tank lining somehow repudiates or voids the tank's UL label of approval.[8] The UL label indicates only that the

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bidding was unethical); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (allegations that gas producers' and sellers' association had with anticompetitive intent refused to approve and to service plaintiff's product stated antitrust claim). But Sessions has not sued the WFCA as a whole, nor impugned the integrity of its ultimate decisionmaking process.

[8]UL — short for Underwriters Laboratories — is a private, nonprofit corporation that establishes standards and specifications for

tank in its original condition satisfied certain wall thickness specifications, and lining a used tank has no effect on its continuing ability to satisfy those requirements. Sessions later procured a letter from UL confirming this position. *See* E.R. at 309.

[9] The district court concluded, however, that Robbins's statements were not deceptive, but "simply part of a reasoned argument." E.R. at 703. The district court said that "Joor may have been wrong, [but] it is clear that the WFCA could not have been misled by what Joor said." *Id.*

[10] It is possible that the district court's conclusion was, for summary judgment purposes, erroneous. If Robbins were "wrong" in his letter, the Article 79 subcommittee may well have been misled. And there is evidence that it was. The minutes from the meeting at which the subcommittee voted to accept Joor's amendment reflect an acceptance of the erroneous idea described above: "The committee was unanimous in their disapproval of cutting an opening in a tank *and thus destroying the integrity of the UL approval* to proceed with the lining process." E.R. at 580 (emphasis added).

Misrepresentations, however, do not necessarily destroy *Noerr-Pennington* immunity. An antitrust plaintiff cannot summon the "sham" exception by alleging that defendant made misrepresentations when pursuing legislative — as opposed to adjudicative — action. *Clipper Exxpress,* 690 F.2d at 1261; *see California Motor Transport,* 404 U.S. at 513; *First Am. Title Co. v. South Dakota Land Title Ass'n,* 714 F.2d 1439, 1447 (8th Cir. 1983),

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products in a wide variety of industries. The UL label on a product indicates that it meets the relevant standards. The parties agree, and the district court found, that UL approval "is essential to the successful marketing of a product." E.R. at 695.

cert. denied, 464 U.S. 1042; *Metro Cable,* 516 F.2d at 228 (7th Cir. 1975).

[11] Sessions, however, argues that the WFCA is not a legislative body. Perhaps so, but it was legislative action that both Sessions and Joor sought. Moreover, the WFCA was an indispensable part of the "political arena." *California Motor Transport,* 404 U.S. at 513. In *Noerr* the Court refused to hold that alleged misrepresentations in a publicity campaign designed to influence legislation were actionable under the Sherman Act. Such conduct fell "clearly into the category of political activity." 365 U.S. at 140-41. That principle controls this case.

[12] Although the issue is a close one, we hold that that principle does not extend to Joor's alleged misrepresentations made *outside* the WFCA lobbying process, *before* the Code was amended, to local fire officials who thereafter denied Sessions the requisite permits for carrying on its work. The record suggests that these officials were induced to believe that tank lining would "void" the UL label or that tank lining was already prohibited by the Code. *See* E.R. at 232-33. In one case at least, Sessions claims to have evidence that it was Robbins himself who persuaded officials to deny Sessions a permit. *See* E.R. at 660.

[13] Misrepresentations made to an executive official fall between the clear rules established in the legislative context (where misrepresentations are *not* actionable) and the adjudicative context (where they *are* actionable). *See* P. Areeda & H. Hovenkamp, *Antitrust Law* 44 (Supp. 1986). Application of these distinctions is not easy. Executive officials may administer the law, adjudicate claims under the law, or, by framing policy, make law. The lines between the executive, legislative, and judicial function are often quite indistinct. Careful case-by-case analysis is

necessary. Where the executive action sought was more a matter of *administering* than of *making* law, misrepresentations inducing the governmental decision will be actionable in antitrust despite the *Noerr-Pennington* doctrine. *C.f., e.g., Woods Exploration & Producing Co. v. Aluminum Co.*, 438 F.2d 1286, 1296-98 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (misrepresentations before state natural gas commission inducing decision under set allocation formulae held unprotected by *Noerr*); *Outboard Marine Corp. v. Pezetel*, 474 F.Supp. 168, 178 (D. Del. 1979).[9]

[14] Here, if Sessions's allegations are true, the fire officials were asked to respond in an administrative capacity. These officials were asked to deny Sessions its permit either because tank lining violated UL standards or because it violated the Code. This would be a clear instance of administering extant, established standards. We hold that these allegations state a limited "sham" exception claim. To succeed, Sessions must show that Joor's misrepresentations — and not any independent

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[9]In *Noerr* itself, defendants had allegedly made misrepresentations to induce executive action. *See* 365 U.S. at 129-30. Defendants apparently sought an executive decision to enforce existing law *more strictly*. *See id.* at 131. That is the kind of policy decision our analysis would probably exclude from the reach of the "sham" exception. In any event, a more recent Supreme Court opinion has clearly established that a person's petitioning immunity does not protect him from at least some deliberate misrepresentations made in pursuit of executive action. *See McDonald v. Smith*, 472 U.S. 479, 484 (1984) (letter sent to president defaming plaintiff, a nominee for United States attorney, was not immunized by defendant's right of petition and was actionable in libel). Because such misrepresentations also fail to serve *Noerr*'s policy or statutory interests, we see no reason to immunize them in antitrust if they are not to be immune in libel. *See* Hurwitz, *supra* note 4 at 83-84; *see also McDonald*, 472 U.S. at 484 (citing antitrust precedent in support of its holding).

factors — caused the fire officials to act. In addition, it must prove all the other elements of a Sherman Act violation before it is entitled to antitrust damages.

The cause of action left to Sessions is a narrow one. Any misrepresentations made by Joor in pursuit of its legislative goals are fully protected under *Noerr-Pennington*. In addition, any injury to Sessions caused by the actual amendment to the Code — whether through governmental or private action in reliance thereon — provides no basis for an antitrust action against Joor. To this extent we fully affirm the summary judgment granted below. We reverse and remand only in order that Sessions be allowed to prove, if it can, injury caused by Joor's misrepresentations to fire officials in their administrative capacity.[10]

AFFIRMED in part; REVERSED and REMANDED in part.

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[10]Sessions may of course also attempt to prove that Robbins made misrepresentations to *private* parties not in pursuit of its governmental aims, but rather to harm the tank lining industry directly. The antitrust actionability of such conduct — regardless of Robbins' position on the Article 79 subcommittee — was established in *American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982). Sessions may also proceed with its state law claims, which were not involved in this appeal.

CASE NO. CV 84-6363 MRP

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SESSIONS TANK LINES, INC., d/b/a
SOUTHWEST TANK LINERS, INC.,
Plaintiff,

v.

JOOR MANUFACTURING, INC., and
DOES 1 through 10, inclusive,
Defendants.

MEMORANDUM OF DECISION AND ORDER GRANTING SUMMARY JUDGMENT

Filed January 17, 1986.

Defendant's Motion for Summary Judgment came on for hearing on June 24, 1985 before the Honorable Mariana R. Pfaelzer. The Court, having considered the papers filed and oral arguments made, grants defendant's Motion for Summary Judgment.

I. BACKGROUND

Plaintiff Sessions Tank Liners, Inc., d/b/a Southwest Tank Liners, Inc. ("Southwest") is a California corporation engaged in the business of lining underground storage tanks used to store hazardous or volatile materials such as gasoline. Tank lining is the process by which storage tanks that have developed leaks are lined while still in their original underground location. Defendant Joor Manufacturing, Inc. ("Joor"), a California corporation, manufactures and sells underground storage tanks.

Plaintiff alleges that defendant conspired to restrain competition by forcing customers who had leaking storage tanks to purchase replacement tanks from defendant

rather than lining goods and services from Southwest. The complaint alleges that this was accomplished through a "campaign of dissemination of false information and other deceptive and coercive tactics" designed to convince legislative bodies to pass statutes that would have the practical effect of prohibiting tank lining.

Plaintiff alleges that this was largely accomplished through defendant's membership in, and dealings with, the Article 79 Subcommittee ("the Subcommittee") of the Western Fire Chiefs Association ("the WFCA"). The WFCA is a non-profit voluntary membership organization. It attempts to protect life and property from harm by fire by developing, publishing and disseminating the Uniform Fire Code ("the UFC"). The UFC sets forth recommended safety standards.

The WFCA has a number of specialized committees which review the UFC and propose changes. These committees are composed of interested parties from private industry and public fire safety officials. Committee proposals are submitted to the WFCA voting members. Only public fire officials may be WFCA voting members. When approved, committee proposals become part of the UFC. State and local authorities often rely on the UFC and frequently these standards are incorporated into state or municipal codes.

Underwriters Laboratories ("UL") is a private corporation which provides two relevant services. First, it develops a set of specifications called a "product standard" for new products. This product standard is industry wide and each competitor's product is measured by this objective standard. Second, UL tests products to determine safety. If UL finds that a manufacturer's product is safe, it permits the manufacturer to attach a UL "label" to that product and will "list" that manufacturer as an

approved manufacturer of the particular product. Being listed, or having a label, is essential to the successful marketing of a product.

Plaintiff contends that as a result of defendant's conspiracy, the WFCA amended the UFC to prohibit tank lining as practiced by Southwest. Plaintiff further contends that as a result of this conspiracy, UL developed new standards which create the impression that only removal and replacement of leaking tanks, rather than lining, can satisfy the UL's standards.

The complaint is in eight counts: (1) restraint of trade in violation of § 1 of the Sherman Act; (2) restraint of trade in violation of § 2 of the Sherman Act; (3) restraint of trade in violation of the Cartwright Act, California Business & Professions Code § 16,700 *et seq.;* (4) unfair competition in violation of Cal. Business & Professions Code § 17,200; (5) tortious interference with contractual relations; (6) tortious interference with prospective advantage; (7) trade libel and disparagement; and (8) defamation. Counts 3-8 are pendent to the federal antitrust claims set out in Counts 1 and 2. Joor has moved for summary judgment as to Counts 1 and 2 and for dismissal of the pendent state claims.

II. DISCUSSION

In its Motion for Summary Judgment, Joor takes the position that it merely engaged in good faith lobbying of the WFCA and UL, both of which it describes as quasi-governmental agencies. Joor argues that under the *Noerr-Pennington* doctrine, bona fide attempts to influence legislative bodies are immune from antitrust scrutiny, regardless of the anti-competitive purpose that prompts such attempts. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine*

Workers v. Pennington, 381 U.S. 657 (1965). The doctrine also extends to attempts to influence administrative and judicial bodies. *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510-511 (1972).

Southwest contends that *Noerr-Pennington* is inapplicable for three reasons: (1) defendant's lobbying efforts were directed to a private association, not a governmental entity, and therefore do not qualify for *Noerr-Pennington* protection; (2) defendant's dissemination of fraudulent information to governmental entities is not protected under *Noerr-Pennington* (the sham exception); and (3) the complaint alleges sufficient facts to satisfy the "co-conspirator" exception to *Noerr-Pennington.*

A. *Lobbying Governmental Entities*

Numerous state and local authorities have adopted the standards set out by the WFCA in its UFC, and have relied on testing procedures of independent laboratories such as UL, in promulgating their tank lining requirements. Such reliance upon the WFCA and UL by these governmental authorities in practical effect has resulted in a delegation of governmental authority to these otherwise private entities. While governmental bodies have retained the power to modify or reject the WFCA and UL recommendations, in practice, it appears that they have accepted and relied on them.

Southwest itself has recognized this to be the case. First, the essence of plaintiff's antitrust claim is that if the WFCA or UL refused to approve a practice, the governmental entities relying on WFCA and UL would necessarily also refuse to approve the practice. Second, as a practical matter, it would be virtually impossible for Joor to lobby the individual governmental entities regarding the adoption of particular specifications or require-

ments in the UFC. These governmental bodies rely on the WFCA and UL and in order to have any effective influence on the government entities, Joor was required to lobby the WFCA and UL.

In *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833 (N.D. Ill. 1983), the court held that defendants' lobbying of UL and the National Fire Protection Association ("the NFPA"), an independent, code-promulgating organization similar to the WFCA, was entitled to *Noerr-Pennington* protection. The court noted that numerous states and municipalities had adopted the public safety standards set out by the NFPA in its model electrical code, and had relied on the testing procedures of laboratories such as UL in promulgating their electrical code requirements. Such reliance, the court found, resulted in a "near complete delegation of governmental authority to these otherwise private entities" in that in order to influence the governmental entities, defendants had no choice but to approach UL and NFPA. *Id.* at 838.

Similarly, in *Rush-Hampton Industries v. Home Ventilating Inst.*, 419 F. Supp. 19 (M.D. Fla. 1976), the court found that *Noerr-Pennington* applied to lobbying or organizations promulgating building codes where approved standards were often incorporated by reference into state and local building codes. The plaintiff was engaged in the manufacture, distribution and sale of ductless bathroom fans. The defendant was a trade association composed of businesses manufacturing and/or selling ductless bathroom fans. The plaintiff sought approval for its new product, ductless fans, from the three regional building code organizations whose primary functions were to promulgate model building codes and building standards for use by state and local entities. The defendant trade

association was alleged to have organized and financed opposition to the plaintiff's new product by opposing the plaintiff's applications before the building code organizations, in violation of the antitrust laws. The court found that the approval by one of the building code organizations was "tantamount to approval by numerous governmental entities . . . as the standards and products are often adopted by reference from those standards and products already reviewed by the organization." 419 F. Supp. at 22. The court held that the *Noerr-Pennington* doctrine protected the statements made by defendants to the building code organizations.

Moreover, *Noerr-Pennington* protection should not be refused because this Court is unable to evaluate the precise extent to which governmental bodies have adopted UL and WFCA standards. As indicated by plaintiff's own allegations, defendant's lobbying of the WFCA and UL brought about plaintiff's injuries precisely because, and only to the extent that, the recommendations made by those organizations were actually adopted by the governmental entities. Accordingly, the Court finds that the defendant's lobbying of the WFCA and UL is immunized from antitrust scrutiny under *Noerr-Pennington*.

B. *The Sham Exception*

Southwest argues that even if the *Noerr-Pennington* doctrine is extended to include Joor's activities with regard to WFCA and UL, Joor's "lobbying" was merely a sham designed to force the WFCA to adopt an unreasonably restrictive code. In *Noerr,* the Supreme Court held that there are some instances where the alleged conspiracy "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U.S. at 144.

Southwest argues that the sham exception to the *Noerr-Pennington* doctrine is applicable here.

This sham exception was the basis for the Supreme Court's decision in *California Motor Transport, supra.* There, the activity which came within the sham exception was the defendants' opposition to every application made by plaintiffs to the California Public Utilities Commission and the Interstate Commerce Commission regardless of the merits of the application. The alleged result "was that the machinery of the agencies and courts was effectively closed" to the plaintiffs. 404 U.S. at 511. *California Motor Transport* distinguishes between those concerted efforts which are genuinely directed at influencing public officials and those efforts which are intended to bar competitors from access to adjudicatory tribunals.

To meet the sham exception, there must be: (1) "some clearly established pattern of misrepresentation"; or (2) "initiation of baseless legal proceedings, or of covert pressures and tactics designed to deprive the administrative body of its ability to function independently. . ." *Rush-Hampton, supra,* at 24. The second test is really a test of the availability of equal access to the decision-making body so as to permit an opponent to urge his position in a meaningful way. "[A] defendant's lobbying activities may not be designed to deprive the opponent of access to the decision-making process." *Wheeling-Pittsburgh Steel, supra* at 842.

Southwest claims that the sham exception applies because: (1) a Joor representative wrote a letter to members of the Subcommittee attacking tank lining which contained false and deceptive statements; and (2) Southwest was not permitted meaningful participation in the deliberations of the Article 79 subcommittee.

1. *Southwest Has Not Established a Pattern of Misrepresentation by Joor to the WFCA and UL.*

In his letter of March 3, 1981 to the Subcommittee, Robbins, the president of Joor, wrote that:

> Although there is some continuing discussion vis-a-vis external vs internal corrosion, two certainties exist:
>
> 1. When leakage is encountered, weakened metal exists, and,
>
> 2. It is difficult to ascertain remaining metal thickness from an observation point inside the tank.
>
> Acceptance of tank lining, as is being proposed, implies the discarding of the UL 58 or equivalent strength requirements.

See Declaration of G. Robert Meachem, Exhibit 4. Southwest claims that Robbins' statement that "when leakage is encountered, weakened metal exists, and . . . it is difficult to ascertain remaining metal thickness from an observation point inside the tank" implies a significant *structural* weakening of the storage vessel. *See* Declaration of G. Robert Meacham, at p. 7. Southwest also claims that Robbins' statement that if tank lining is accepted as currently proposed, it would imply the "discarding of UL 58 or equivalent strength requirements" falsely suggests that cutting a tank would void the UL label. *See* Declaration of G. Robert Meacham, at p. 8. These two statements are the only purportedly false and deceptive statements offered by Southwest to prove a pattern of misrepresentation before the quasi-public bodies lobbied by Joor.

The Court *does not find that the statements made in* the letter in question were false and deceptive. After having read the statements in context, the Court is convinced that they are simply part of a reasoned argument presented to the WFCA by Joor and that, while plaintiff may disagree with the position taken by Joor, there is no misrepresentation in the letter. All Joor states is that UL 58 was designed to establish a standard for minimum structural strengths of underground steel tanks as well as the equivalency standard for tanks made of other materials and that no deviation from or degradation of this standard of structural capability is permitted. Joor then says that product leakage is usually evidence that the steel has been reduced in thickness and therefore weakened. However, Joor continues, it is difficult to tell from inside the tank how significant the degradation of the structural integrity of the tank is and no test exists for this purpose. It is Joor's conclusion therefore that the only way to insure that UL 58 strength requirements are maintained is to replace the leaking tank, not to line it.

That is a fair reading of the disputed language of the letter and, while Joor may have been wrong, it is clear that the WFCA could not have been misled by what Joor said. Joor is entitled to advocate its position just as plaintiff is. Clearly, there is no disputed issue of material fact as to Joor's submitting false and misleading statements to either the WFCA or the UL.

2. *Joor Did Not Deprive Southwest of Access to the Decision-Making Body.*

Southwest also claims that a factual issue exists as to "whether the denial of access to the Article 79 subcommittee and its activities reflects a denial of due process and anti-competitive acts." *Southwest's Opposition,* at 15-16. There is no evidence that Southwest was denied access to

the Subcommittee. In his deposition, Sessions, the President of Southwest, stated that he did attend a subcommittee meeting on October 14, 1980. *Joor Memo in Support of Summary Judgment Motion*, at Tab 16. Mr. Sessions also stated that he distributed materials to the Subcommittee with specifications for the lining of tanks. *Id.*, at Tab 17. Furthermore, at a March 17, 1981 meeting of the Article 79 subcommittee, according to Mr. Sessions, Mr. Paul Meli of Bridgeport Chemical Co. spoke on behalf of both Bridgeport and Southwest. *Id.*, at Tab 18.

Plaintiff nevertheless contends that it was denied effective access because it could not gain membership as a voting member of the Subcommittee until 1982. It requested this right in 1980. Joor maintained such a right throughout. This claim of denial of effective access does not meet the sham exception for two reasons. First, the subcommittee was not a quasi-legislative body; it was only an advisory body. Neither Joor nor Southwest ever had a right to participate in the code promulgating body's (the WFCA's) deliberations and voting. Second, and more importantly, membership, or denial of membership on a subcommittee of a code promulgating body is not the type of denial of access to which the sham exception is directed. As stated above, it is activities which have the effect of freezing opponents out of the decision-making process which have concerned courts. Here, the Subcommittee remained open to the plaintiff and plaintiff clearly had an opportunity to be heard. Accordingly, the Court finds that plaintiff was not denied effective access to the relevant decision-making body.

C. *The Co-Conspirator Exception to Noerr-Pennington Does Not Apply*

Plaintiff argues that summary judgment is improper because the allegations of the complaint state a claim

under the co-conspirator exception to the *Noerr-Pennington* doctrine. In the Ninth Circuit, *Noerr-Pennington* does not obtain when a member of a legislative body or other public official actively participates in a larger conspiracy to restrain trade. *Harman v. Valley National Bank of Arizona*. 339 F.2d 564 (9th Cir. 1964).

The Court finds that plaintiff has not raised an issue of triable fact as to the co-conspirator exception. Plaintiff offers only (1) some evidence of nominal gifts to committee members; and (2) certain correspondence between employees of Joor and WFCA members. Having considered the contents of these letters, the Court concludes that they do not evidence any concerted action to restrain trade. As to the nominal gifts, these fail to prove improper influence, or any sort of conspiracy at all. Accordingly, the co-conspirator exception to *Noerr-Pennington* does not apply.

D. *Counts 3-8*

Counts 3-8 allege various violations of state law. Southwest asks this Court to assume pendent jurisdiction over these claims. However, since the substantial federal antitrust claim must be dismissed, the Court in its discretion dismisses Southwest's state law claims for lack of subject matter jurisdiction. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

III. IT IS THEREFORE ORDERED that:

1. Defendant's Motion for Summary Judgment on Counts I and II is granted.

2. Counts 3-8 of the Complaint are dismissed for lack of subject matter jurisdiction.

DATED: January 15, 1986.

MARIANA R. PFAELZER
MARIANA R. PFAELZER
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 534, 735 August Term 1986
Argued: January 20, 1987 Decided: April 22, 1987

Docket Nos. 86-7734, 86-7758

INDIAN HEAD, INC.,
Plaintiff-Appellant, Cross-Appellee,

AGAINST

ALLIED TUBE & CONDUIT CORPORATION,
Defendant-Appellee, Cross-Appellant.

Filed April 22, 1987.

Before: LUMBARD, KEARSE, and PRATT,
Circuit Judges.

Indian Head, Inc. appeals from a judgment notwithstanding a jury verdict, entered in the Southern District by Judge John E. Sprizzo, holding that defendant Allied Tube & Conduit Corp.'s attempts to influence a private standard-setting organization were protected from antitrust scrutiny under the *Noerr-Pennington* doctrine. Allied cross-appeals, arguing that, as a matter of law, its behavior did not constitute a violation of the antitrust laws.

Judgment n.o.v. vacated and remanded with directions to reinstate the jury's award.

FREDRIC W. YERMAN,
New York, N.Y. (Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y., Michael Malina, Ira S. Sacks, Richard A. De Sevo, Bert L. Slonim, Donna M. Gerber, of counsel), for Plaintiff-Appellant Indian Head, Inc.

FRANK H. WRIGHT,
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ROBERT D. PAUL,
General Counsel, Federal Trade Commission, Washington, D.C. (Ernest J. Isenstadt, Assistant General Counsel, Dean C. Graybill, Michael Goldenberg, Attorneys, Federal Trade Commission, Washington, D.C., of counsel), as Amicus Curiae.

DOUGLAS H. GINSBURG,
Assistant Attorney General, Department of Justice, Washington, D.C. (W. Stephen Cannon, Deputy Assistant Attorney General, Catherine G. O'Sullivan, Marion L. Jetton, Attorneys, Department of Justice, Washington, D.C., of counsel), as Amicus Curiae.

LUMBARD, *Circuit Judge:*

This case requires us to decide whether federal antitrust laws apply to attempts to influence the promulgation of a code of safety standards by private industry. In its complaint, plaintiff Indian Head, Inc. (Carlon) charged that defendant Allied Tube & Conduit Corp. had conspired to prevent inclusion of Carlon's product in industry standards. The jury found for Carlon, and awarded it $3.8 million in damages (before trebling). Carlon now appeals from a judgment for defendant, notwithstanding the jury verdict, entered by Judge John E. Sprizzo in the Southern District on July 31, 1986. Judge Sprizzo reasoned that the doctrine developed in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington,* 381 U.S. 657 (1965), which protects petitioning of the government from Sherman Act scrutiny, also protects attempts to influence a private standard-setting organization where, as here, governments routinely incorporate that organization's standards into their legal codes. Allied cross-appeals, claiming that, as a matter of law, its conduct did not constitute an unreasonable restraint of trade. We vacate the judgment n.o.v. and remand with directions to reinstate the jury's award.

I.

The evidence presented to the district court established the following: Carlon, a division of Indian Head, Inc., manufactures and sells flexible plastic electrical conduit made from polyvinyl chloride (PVC). Electrical conduit is hollow tubing used in building construction to carry insulated electrical wires through floors, walls, and ceilings, and outside buildings, and to protect the wires from damage or abuse. Carlon's product competes in the marketplace against steel conduit, of which Allied is the

largest producer in the United States. Carlon claims that PVC conduit has a number of significant competitive advantages over steel conduit, including its pliability, its lower installed cost, and its lower susceptibility to short circuiting. On the other hand, as the district court instructed the jury, "there is a scientific basis for concern about safety of PVC products with respect to toxicity. . . . the parties do not dispute that people disagree on the issue and there is an objective basis for a concern for safety." Allied particularly stresses the fact that, during fires in high-rise structures, PVC conduit may burn, emitting toxic smoke and fumes.

This case arises from Allied's efforts to block Carlon's proposal to include PVC conduit as a permissible type of electical conduit in the 1981 edition of the National Electrical Code (NEC) — a model code, promulgated by the National Fire Protection Association (NFPA), which establishes product and performance requirements for electrical systems, including electrical conduit. The parties agree that NEC is the most widely disseminated and adopted model code in the world. The parties agree further that a substantial number of state and local governments adopt the NEC as law in whole or in part.[1]

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[1]A survey, conducted by Allied and submitted to the district court in the Post-Trial Affidavit of John Lison, Allied's Vice President and General Counsel, shows the extent of the governmental reliance upon the NEC as of June, 1982: Of the 51 jurisdictions surveyed (50 states and the District of Columbia), 26 adopted the NEC through the process of incorporation by reference, without changing a word; an additional 19 adopted the NEC with amendments; those jurisdictions which amended the NEC before adopting it on average changed only 12 of its 114 articles; none of the remaining six adopted their own electrical code. Allied's survey also included all cities over 100,000 and a select group of 450 cities whose population exceeded 25,000. 495 cities responded, all with their own electrical code: 232 cities

Every three years, the NFPA — a private, voluntary organization composed of over 31,500 individual and group members representing industry, labor, academia, insurance, organized medicine, firefighters, and government — revises the NEC through a multi-step, several-year-long process. The NFPA first submits proposed amendments to the NEC to a Code-Making Panel (CMP) made up of professionals with technical expertise in the area. In order to prevent domination by special interests, no more than one-third of any CMP's membership may represent a single interest. If approved by the CMP, a proposal then goes to the full membership, together with the comments and voting position of each CMP member. After the membership has had an opportunity to comment on the proposal, the CMP considers it a second time, along with the membership's comments. If again approved, the NFPA publishes the proposed amendment to the full membership. The entire membership then votes.

In 1980, when Carlon's proposal was being considered, a simple majority of those present at the annual meeting was sufficient to approve or reject a proposal. Disappointed members can appeal the membership's vote to NFPA's Standards Council and ultimately to its Board of Directors. Finally, NFPA rules also permit *de novo* review of a defeated proposal by the CMP, the Standards Council, and the Board of Directors, in a procedure known as a Tentative Interim Amendment (TIA). If adopted, a TIA includes or excludes a proposal on an interim basis until the next code cycle.

On September 18, 1978, Carlon began the process of obtaining NEC approval for PVC conduit by submitting its proposal, known as Article 331, to the NFPA, along with a fact-finding report by the Underwriters Laborato-

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adopted the NEC exactly as written; 256 cities adopted the NEC and made amendments to it, on average changing only 11 articles.

ries. The NFPA directed the proposal to CMP-8, which initially rejected it. However, in December, 1979, based on further fact-finding and field demonstrations by Carlon, CMP-8 reversed its earlier decision and approved Article 331 for review by the full membership. The NFPA then scheduled the article for consideration by the full membership at the next annual meeting, to be held in Boston in May, 1980.

Recognizing that inclusion of PVC conduit in the NEC might adversely affect its sales of steel conduit, Allied's representatives met with a number of different groups, including other members of the steel industry, to gather votes in opposition to Article 331. On January 30, 1980, the Steel Rigid Conduit and Electrical Section of the National Electrical Manufacturers Association (NEMA) held a meeting to discuss the matter. At that meeting, and at a full meeting of the NEMA Steel Section held in February, everyone agreed to bring as many voters as possible to the upcoming NFPA meeting; Allied itself pledged to bring at least 100 people to vote against Article 331. Additional meetings and communications were held among the steel interests to coordinate their efforts to block Article 331's adoption. Acting within the letter of NFPA rules, Allied eventually arranged for 155 persons — including employees, sales agents, the agents' employees, company executives, employees of two of Allied's divisions, and the wife of the national sales director — to join the NFPA, to register as voting members, and to attend the annual meeting to vote against the proposal. Allied also paid over $100,000 for the membership, registration, and attendance expenses of these voters. The other steel interests similarly recruited and paid for the expenses of voters at the May, 1980 meeting. In total, the steel interests gathered 230 votes.

Carlon made no attempt to sign up additional employees or sales agents other than the four already scheduled to attend the meeting. Until about April 18, 1980, H.F. van der Voort, who coordinated Carlon's efforts to amend the NEC, apparently believed that the NFPA's rules did not permit a motion from the floor to return Article 331 to CMP-8. On or about April 18, van der Voort discovered that such a motion could, in fact, be made. By this time, Carlon could not have signed up additional members to vote at the May meeting; under NFPA rules, only those who have been NFPA members for at least 30 days could vote at an annual meeting. However, Carlon did solicit support from members of the Society of Plastics Industry, the NEMA plastics section, other members of the plastics industry, NFPA's railroad and health care sections, and the Fire Marshals Association of North America.

At the annual meeting, Allied instructed its personnel where to sit, based upon a detailed seating chart, and appointed group leaders to instruct the voters "how the discussion is progressing and how to vote." Boxed lunches were provided and the voters were told to "stay nailed to their seats" until the end of two evening sessions. Group leaders used walkie-talkies and hand signals to facilitate communication. Few of Allied's voters had any of the technical documentation necessary to follow the meeting; nor did any of them speak in opposition to Article 331 in the course of the meeting.

Two votes were taken on the motion to return Article 331 to CMP-8. The first, a voice vote, was inconclusive. The second, a standing vote, approved the motion by a vote of 394-390. To insure its victory, Allied insisted that its representatives remain in their seats until 2:00 a.m., when the NFPA membership voted to approve the entire NEC, without Article 331. Carlon immediately appealed

the decision of the membership to the Standards Council, which referred the appeal to the Board of Directors. Finding that the NFPA rules had been circumvented but not violated, the Board denied the appeal, and returned Article 331 to the CMP-8. In June, 1980, Carlon applied for a TIA including Article 331 in the 1981 NEC. After the proposed TIA wound its way through the various levels of the code-making process, encountering opposition by Allied at each step, a subcommittee of the Board of Directors found that Carlon's request was not sufficiently exigent to warrant issuance of the TIA.

Carlon commenced this action against Allied and the NFPA on October 9, 1981, alleging that they, the American Iron & Steel Institute, other steel conduit manufacturers, and Allied's independent sales agents had "combined and conspired to prevent competition from non-metallic tubing by excluding it from the 1981 NEC" by "subverting the consensual standards rules and procedures of the NFPA."[2] After extensive pretrial proceedings, a bifurcated trial commenced on March 4, 1985 before Hon. John E. Sprizzo and a jury. Prior to the submission of the liability issues to the jury, Allied conceded that it had a pecuniary or commercial interest in seeing that PVC conduit was not included in the NEC; Allied also admitted that it had agreed with the other steel companies to oppose Article 331.

After four days of deliberation, the jury returned its verdict and also answered specific interrogatories submitted by the court. The jury found that Allied's conduct subverted the consensus standard-making process of the NFPA, and constituted an unreasonable restraint of trade in violation of the antitrust laws. Judge Sprizzo

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[2]Prior to trial, Carlon discontinued with prejudice its action against the NFPA.

then charged the jury on Carlon's theory that it was injured by the stigma of its exclusion from the 1981 NEC and Allied's marketing of that exclusion.[3] Relying upon these instructions, the jury found that "as a proximate result of Allied's unreasonable restraint of trade in violation of the antitrust laws," Carlon lost $3.8 million in profits.

Following the trial, Allied moved for a judgment n.o.v., or, alternatively, for a new trial. Allied claimed that the *Noerr-Pennington* doctrine and the first amendment barred entry of judgment in Carlon's favor and attacked on various grounds the court's charge and the jury's findings. Judge Sprizzo rejected the charge and jury findings challenges but held that the *Noerr-Pennington* doctrine required that the jury's verdict be set aside.

II.

The *Noerr-Pennington* doctrine originated in a trilogy of Supreme Court cases. The Court first focused upon the tension between the first amendment and the Sherman Act in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). As part of an "economic life or death" struggle between the railroads and the emerging trucking industry over control of the

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[3]Carlon alleged that the stigma of not obtaining NEC approval of its product and Allied's "marketing" of that stigma caused independent marketplace harm to Carlon in those jurisdictions permitting use of PVC conduit, as well as those which later adopted the 1984 NEC, which permitted use of PVC conduit in buildings less than three stories high. It did not seek redress for any injury arising from the adoption of the NEC by the various governments. *See Parker v. Brown*, 317 U.S. 341 (1943) (state action doctrine). The district court instructed the jury accordingly. Allied does not challenge the correctness of, or the foundation for, the jury's computation of the damage resulting from that stigma.

long distance freight hauling market, the railroads began a deceptive publicity campaign designed to destroy the truckers' goodwill among their customers and the general public, and to advocate legislation that would hamper the trucking industry's ability to compete against the railroads. In a unanimous opinion authored by Justic Black, the Court reversed the judgment for the truckers, holding that Congress had not intended the Sherman Act to apply to "activities compris[ing] mere solicitation of governmental action with respect to the passage and enforcement of laws." *Id.* at 138.

While noting the "essential dissimilarity" between joint efforts to seek legislation and "agreements traditionally condemned by § 1 of the Act," *Id.* at 136, the Court primarily feared that an expansive construction of the Act "would raise important constitutional questions" regarding the right to petition the government guaranteed by the first amendment. *Id.* at 138. The Court refused to "lightly impute to Congress an intent to invade these freedoms," *Id.*, especially because the legislative history of the Act provided no basis for concluding that the purpose of the Act was "to regulate, not business activity, but political activity . . . ." *Id.* at 137. Notwithstanding, the Court cautioned: "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Id.* at 144.

In *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), the Supreme Court extended *Noerr's* exculpatory principles to attempts to influence the executive branch; the Court held that *Noerr* protected the efforts of large mine owners and union officials to squeeze

out smaller coal producers by persuading the Secretary of Labor to raise minimum wage levels. Justice White stated that, "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *Id.* at 670.

The last of the trilogy, *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972), made three important contributions to the development of the doctrine: First, the Court applied *Noerr* to administrative and adjudicative proceedings. Second, it provided the Supreme Court's first application of the "sham" exception foreshadowed in *Noerr:* The Court held that a group of trucking companies' opposition to each and every license application made by their competitors " 'with or without probable cause, and regardless of the merits of the cases,' " did not deserve *Noerr-Pennington* immunity. Finally, in so holding, *California Motor Transport* made clear that the *Noerr-Pennington* doctrine rested squarely upon the first amendment rights of petition and association. *Id.* at 510-12.

Noting that "the decision of the NFPA will be largely determinative of what the legislatures do," the district court concluded that there was "an intent to influence legislative action through the NFPA in this case, which is protected by *Noerr-Pennington.*" Three previous district court decisions have reached similar conclusions. *Sessions Tank Lines, Inc. v. Joor Manufacturing, Inc.*, 1986-1 Trade Case (CCH) ¶ 66,989 (C.D. Cal. 1986) (Western Fire Chiefs Association), *appeal docketed*, No. 86-6208 (9th Cir.); *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833 (N.D. Ill. 1983) (NFPA); *Rush-Hampton Industries v. Home Ventilating Institute*, 419 F. Supp. 19 (M.D. Fla. 1976) (Southern

Building Code Congress; International Conference of Building Officials; Building Officials and Code Administration International). These decisions rely upon two intertwined yet separable strands of argument: First, because state and local governments routinely enact the NEC into law, the NFPA takes on a "quasi-legislative" nature. Therefore, the argument goes, under *Noerr-Pennington*, attempts to influence the NFPA may be equated with attempts to influence the government. Second, because the NEC forms the basis for a substantial number of governmental codes, Allied's conduct should be construed as an indirect petition to state and local governments. As we conclude that Allied's "ballot stuffing" — a subversion of the NFPA code-making process — should not be deemed governmental petitioning, we find neither of these arguments persuasive.

A.

We decline Allied's invitation to extend *Noerr-Pennington* immunity to lobbying activities directed toward a "quasi-legislative" body such as the NFPA.[4] First, the policies which underlie the doctrine do not warrant such an extension. *Noerr's* holding depended upon the unique nature of petitions directed to the government in our political system: Justice Black focused upon the "right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws . . . ." 365 U.S. at 139. He explained that, "[i]n a representative democracy such as this, . . . gov-

[4]Allied has stipulated that the NFPA is a "private, *non-governmental* organization." (emphasis added). Moreover, Allied has made no claim of any official delegation of governmental power to the NFPA. Thus, the NFPA's alleged "quasi-legislative" status results solely from the *de facto* "delegation" of law-making authority evinced by the extent of the reliance of the various governments upon the NEC.

ernment act[s] on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Id.* at 137. The Court feared that applying the Sherman Act to "disqualify people from taking a public position on matters in which they are financially interested" could "deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them." *Id.* at 139. Moreover, "such a holding would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade." *Id.* at 137.

These concerns do not apply with equal force to private organizations. Ideally, a legislature acts in the public interest. If it fails to do so, its members must answer to the constituents they represent. We must therefore allow an unrestricted flow of information to the government to ensure a complete consideration of the issues, secure in the reasonable expectation that our representatives will act in the public interest. No similar safeguards exist to prevent a private organization from adopting policies contrary to the interests of the general public — in the instant case, establishing an anticompetitive restraint of trade. *See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.,* 456 U.S. 556, 571 (1982) (standard-setting organizations may "be rife with opportunities for anticompetitive behavior"); *see generally* Hurwitz, *Governmental Process, the First Amendment, and the Boundaries of Noerr,* 74 Geo. L.J. 65, 90-93 (1985).

As the Supreme Court stated in *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 45 (1985), "[w]e may presume, absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the

other hand, may be presumed to be acting primarily on his or its own behalf." *See also Hydrolevel. supra,* 456 U.S. at 571 ("Although, undoubtedly, most serve [private standard-setting organizations] without concern for the interests of their corporate employers, some may well view their position . . . , at least in part, as an opportunity to benefit their employers."). A private organization's agenda often will not coincide with, and may be directly contrary to, the interests of the broader public. Neither the organization, its membership, nor its leadership is checked by any accountability to the general public. Moreover, even if the organization attempts to act in accordance with its conception of the public interest, that conception is necessarily colored by the composition of its membership. *See* Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health,* 56 Tex. L. Rev. 1329, 1380-86 (1978) (private standard-setting organizations may not provide "sufficient participation by consumers, workers, and small business," and may not give "adequate consideration" to "certain noneconomic interests in developing a consensus when most of the participants are representatives of economic interests").

Our concern that these organizations might operate contrary to the public interest becomes particularly acute in view of their importance within the economy. A private standard-setting organization "wields great power in the Nation's economy." *Hydrolevel, supra,* 456 U.S. at 570. The standards it develops and their interpretations " 'may result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country,' as well as entire segments of an industry." *Id.,* quoting H.R. Rep. No. 1981, 90th Cong., 2d Sess., 75 (1968).

Second, extending *Noerr-Pennington* to such "quasi-legislative" bodies would raise serious practical problems: How many and which governmental bodies must enact a code before the organization takes on a quasi-legislative nature? To what extent does a code have to be enacted? If the governmental bodies decide to amend a code before adopting it, how extensive can the changes be before the members of the organizations lose *Noerr-Pennington* protection? The difficulty of answering such questions underscores the differences between petitioning a governmental body and lobbying a private organization.

Thus, we find Judge Wisdom's opinion in *Feminist Women's Health Center, Inc. v. Mohammad,* 586 F.2d 530 (5th Cir. 1978), *cert. denied,* 444 U.S. 924 (1979), to be persuasive authority. In *Mohammad,* an abortion clinic claimed that members of a nearby hospital's OB-GYN staff had conspired to restrain trade in the abortion market in the Tallahassee area. The defendant physicians had communicated their concerns about the ethics of some of the clinic's practices to a private organization of area physicians, to the Executive Director of the Florida Board of Medical Examiners (BOME), and to the head of residency at another hospital. At the same time, the physicians discussed their concerns amongst themselves. The district court granted summary judgment to the doctors, holding that the communications and discussions were protected under *Noerr-Pennington.*

The Fifth Circuit disagreed. The court distinguished between the communications addressed to the BOME, "a creature of state law," *id.* at 542, and the other communications. The former were "a form of activity . . . protected by the *Noerr-Pennington* doctrine absent proof of sham." *Id.* However, this protection did not extend to the other communications, even though state statutes vested the recipient organizations "with a kind of quasi-legislative

authority." *Id.* at 545. State statutes permitted the BOME to take action against physicians disciplined by private medical groups, but did not require that it do so. Therefore, Judge Wisdom concluded, "[h]ospital medical staffs and medical societies play an important role in Florida's regulatory scheme, but that role is not a governmental one." *Id.* (footnotes omitted).

We believe that *Mohammad* has application here. State and local governments are no more required to enact the NEC into law than the BOME was required to act upon the conclusions of the private disciplinary groups in *Mohammad.* The fact that governments usually do accept the recommendations embodied in the NEC does not transform the NFPA into a governmental organ; consequently, attempts to influence the NFPA, a private organization, cannot claim *Noerr-Pennington* protection. *See also United States v. Johns-Manville Corp.,* 259 F. Supp. 440, 452-54 (E.D. Pa. 1966) (recognizing that activities designed "to influence the decision of public officials" are protected under *Noerr-Pennington,* but refusing to grant summary judgment dismissing claims that defendant conspired to bring about the adoption of anticompetitive pipe specifications by two private organizations).

B.

We also reject Judge Sprizzo's conclusion that Allied's "intent to influence legislative action through the NFPA" brought its activities within the bounds of *Noerr-Pennington.* Allied's behavior, which itself caused independent antitrust injury to Carlon, should not be excused merely because its actions also indirectly influenced state and local governments. Simply put, Allied's conduct did not constitute petitioning of the government within the meaning of *Noerr-Pennington*; rather, its conduct was a subversion of the legitimate purposes of the NFPA.

First, in deciding whether group action falls within the bounds of *Noerr-Pennington,* several courts of appeals have drawn a distinction between the submission of a group's recommendations to the government and the antecedent conduct which generated those recommendations. In *Mohammad, supra,* the Fifth Circuit distinguished between the actions of medical review committees in "reporting disciplinary findings and suspected violations to the BOME [which] may be petitioning activity within the meaning of the first amendment," and "communications within those groups[, which] are not." 586 F.2d at 545. Similarly, in *Litton Systems, Inc. v. American Telephone & Telegraph Co.,* 700 F.2d 785 (2d Cir. 1983), we refused to grant *Noerr-Pennington* protection to a conspiracy to establish an anticompetitive tariff merely because the tariff was eventually filed with the FCC. We noted that "[t]he decision to impose and maintain the interface tariff was made in the AT&T boardroom, not at the FCC." *Id.* at 807. The fact that the FCC "might ultimately set aside" the tariff did "not transform AT&T's independent decision . . . into a 'request' for governmental action or an 'expression' of political opinion." *Id.* (footnote omitted). *See also United States v. Southern Motor Carriers Rate Conference, Inc.,* 702 F.2d 532, 542 (5th Cir. 1983) (*Noerr* does not protect collective action by common carriers to establish anticompetitive rates which are eventually submitted to the state regulatory commission, but does protect the submission of those rates), *aff'g en banc,* 672 F.2d 469 (5th Cir. 1982), *rev'd on other grounds,* 471 U.S. 48 (1985). These decisions control the instant case.

Second, the district court's application of the *Noerr-Pennington* doctrine contravenes the maxim that "exemptions from the antitrust laws must be construed narrowly." *Union Labor Life Insurance Co. v. Pireno,* 458 U.S. 119, 126 (1982). The policies behind the *Noerr-Pennington*

doctrine — protecting the right to petition the government and insuring an uninhibited flow of information to governmental representatives — do not require that Allied's anticompetitive behavior be ignored. Allied might have made its views known, and provided all the information it deemed relevant, by directly petitioning state and local governments at the adoption stage.

Nor are we swayed by Allied's contention that, because of the heavy reliance placed upon the NEC by various governments, the only effective method of influencing these governments is through the NEC amendment process. Allied's own survey shows that over half the states and cities polled either amended the NEC before adopting it or refused to adopt it at all. As the district court acknowledged, "there is obviously an opportunity to change the mind of the legislature and . . . there is an opportunity for the defendant and the plaintiff to lobby at that level . . . ."

Allied finally argues that a refusal to accord its behavior *Noerr-Pennington* protection would be inconsistent with the Supreme Court's grant of that protection to the railroad's publicity campaign in *Noerr*. *See also Federal Prescription Service v. American Pharmaceutical Association,* 471 F. Supp. 126, 130 (D.D.C. 1979) (efforts to solicit support in a campaign to induce governmental action "were at least indirect attempts to influence governmental behavior" deserving protection), *aff'd,* 663 F.2d 253, 262 n.6 (D.C. Cir. 1981), *cert. denied,* 455 U.S. 928 (1982). That holding, Allied contends, authoritatively abolishes any distinction between "direct" and "indirect" petitioning. However, in *Noerr,* the Court held that the railroad's publicity campaign did not violate the antitrust laws because "a publicity campaign to influence governmental action falls clearly into the category of political activity" to which the Sherman Act does not apply. 365 U.S. at 140-41. Congress, the Court concluded, had not

intended the Sherman Act to have "application in the political arena" as "Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities . . . ." *Id.* at 141. Allied cannot similarly claim that its conduct constituted "political activity" conducted within the "political arena."

III.

On cross-appeal, Allied claims that, as a matter of law, its conduct did not constitute an unreasonable restraint of trade.[5] First, Allied argues that an industry participant in a private standard-setting organization should not be held liable under the antitrust laws where a genuine safety concern at least partially motivates its involvement in the process; the organization's rules prevent domination by commercial interests and accord due process to the participants; and objective scientific evidence supports the resulting standard. *Cf. Hydrolevel, supra,* 456 U.S. at 577 ("And in this case, we do not face a challenge to a good-faith interpretation of [a private] code reasonably supported by health or safety considerations."). Allied points out that the fear of treble damages and judicial second-guessing might chill participation by financially interested industry members, who have an incentive to undertake the costly process of generating and

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[5]As part of its cross-appeal, Allied also urges that the district court improperly submitted a separate special jury interrogatory asking whether Allied's opposition to Article 331 constituted the "least restrictive means" of expressing opposition to PVC conduit. Carlon argued to the court that the answer was potentially dispositive. Even though Judge Sprizzo disagreed with Carlon's legal theory, he did not abuse his discretion by submitting the question to the jury in order to avoid the possibility of a retrial, *see Litton Systems, supra,* 700 F.2d at 803 & n.19, particularly because he made clear to the jury that the existence of less restrictive means "was not dispositive" of and was only "tangentially related" to Carlon's antitrust claim.

gathering costly safety information. *See, e.g.,* M. Olsen, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1971) at 14-16. Moreover, while judges are specialists in procedural fairness, they will often have little expertise in the substantive area to which a standard applies. *Cf., e.g., Kletschka v. Driver,* 411 F.2d 436, 443 (2d Cir. 1969) (The infeasibility of reviewing every decision and the lack of technical expertise in the substantive area means that "the courts should seek to discourage arbitrary agency action by enforcing the various procedural rights . . . and not by undertaking a full substantive review of the justification for the decision.").

However, in this case, Allied violated the integrity of the NFPA's procedures. The jury found that, although Allied acted within the letter of the NFPA's rules, its conduct "subverted" the code making process which Allied admits contained an inherent "potential for abuse." The record substantiates this conclusion: the steel interest's recruitment of the 230 members for a single vote gave it a disproportionate voice, inconsistent with the concept of "consensus" standard making; few of Allied's recruits had the knowledge or inclination to make an independent decision on the merits of the issue; the industry reacted negatively to what the trade magazines termed the conversion of NFPA's "code-making process . . . into a battleground for establishing commercial preference for competing product types;" on Carlon's appeal, the NFPA Board of Directors found that Allied had "circumvented" NFPA rules; Jack Sanders, chairman of an NFPA committee formed to review its voting procedures after the May, 1980 meeting, testified that Allied's actions were inconsistent with the intent of those procedures; following, and as a direct result of, Allied's conduct, the NFPA amended its rules to prevent a recurrence of the PVC conduit vote; finally, Judge Sprizzo sustained the jury's verdict against Allied's chal-

lenges. In short, Allied packed the annual meeting with newly registered members, whom it subsidized, for the sole purpose of achieving an anticompetitive result — the exclusion of PVC conduit from the marketplace. We refuse to permit a defendant to use its literal compliance with a standard-setting organization's rules as a shield to protect such conduct from antitrust liability.

Nor do we find any merit in Allied's claim that it should not be held liable under the antitrust laws because the exclusion of PVC conduit from the 1981 NEC was supported by objective scientific evidence. The "objective validity" of a restraint has never been a defense to an antitrust charge, *cf. United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927) (reasonableness of price is not a defense to a price fixing charge).

IV.

The judgment of the district court is vacated and remanded with directions to reinstate the jury's award.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 30, 1987, I served the within Cross Petition for a Writ of Certiorari in re: "Sessions Tank Lines, Inc. vs. Joor Manufacturing, Inc." in the United States Supreme Court, October Term 1987, No. 87-687;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Maxwell M. Blecher
Blecher & Collins
A Professional Corporation
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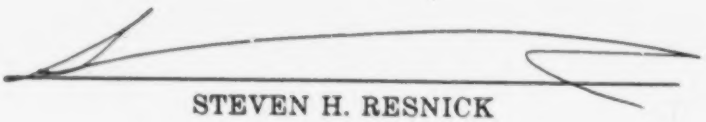
28th Floor
Los Angeles, California 90017

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 30, 1987, at Los Angeles, California



STEVEN H. RESNICK

Supreme Court, U.S.
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No. 87-687
No. 87-916

In the Supreme Court of the United States

October Term, 1987

SESSIONS TANK LINERS, INC., d/b/a SOUTHWEST TANK LINERS, INC.,

Petitioner and Cross-Respondent,

v.

JOOR MANUFACTURING, INC.,

Respondent and Cross-Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONSE TO CROSS-PETITION

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TOPICAL INDEX

Page

A. Introduction 1

B. Even Assuming That The *Noerr-Pennington* Doctrine Immunizes Joor's Petitioning Of The WFCA, The Sham And Co-Conspirator Exceptions To The Doctrine Were Satisfied 3

C. Conclusion 6

TABLE OF AUTHORITIES CITED

Cases Page

Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555 (5th Cir. 1984), *cert. denied sub nom.* Gulf Coast Cable Television Co. v. Affiliated Capital Corp., 474 U.S. 1053, 106 S. Ct. 788 (1986) 5

Byrne v. State Personnel Board, 179 Cal. App. 2d 576, 4 Cal. Rptr. 32 (1960) 4

Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240 (9th Cir. 1982), *cert. denied,* 459 U.S. 1227, 103 S. Ct. 1234 (1983) 3, 5

Harman v. Valley National Bank of Arizona, 339 F.2d 564 (9th Cir. 1964) 5

In re Airport Car Rental Antitrust Litigation, 521 F. Supp. 568 (N.D. Cal. 1981), *aff'd*, 693 F.2d 84 (9th Cir. 1982), *cert. denied sub nom.* Budget Rent-A-Car of Washington-Oregon, Inc. v. Hertz Corp., 462 U.S. 1133, 103 S. Ct. 3114 (1983) 5

Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938 (2d Cir.), *cert. granted,* ___ U.S. ___, 108 S. Ct. 65 (1987) 1, 2

Miami International Realty Co. v. Town of Mt. Crested Butte, 1984-2 Trade Cas. (CCH) ¶ 66,166 (D. Colo. 1984) 5

Outboard Marine Corp. v. Pezetel, 474 F. Supp. 168 (D. Del. 1979) 3

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In the Supreme Court of the United States

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SESSIONS TANK LINERS, INC., d/b/a SOUTHWEST TANK LINERS, INC.,

Petitioner and Cross-Respondent,

v.

JOOR MANUFACTURING, INC.,

Respondent and Cross-Petitioner.

PETITIONER'S REPLY TO CROSS-PETITION

A. Introduction

On October 26, 1987, petitioner Sessions Tank Liners, Inc., d/b/a Southwest Tank Liners, Inc. ("Southwest"), filed its petition for writ of certiorari. On November 27, 1987, Joor Manufacturing, Inc. ("Joor"), filed a cross-petition for writ of certiorari. On February 26, 1988, the Clerk of this Court invited Southwest to respond to Joor's cross-petition.

Both parties agree that important issues of first impression are raised by the Ninth Circuit's decision below and the related decision in *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938 (2d Cir.), *cert. granted,* ___ U.S. ___, 108 S. Ct. 65 (1987). However, it should be carefully noted that Southwest

and Joor disagree as to how the central issue should be framed.

Southwest believes that petitioning of a *private* standards-setting organization, such as the Western Fire Chiefs Association ("WFCA"), is not protected by *Noerr-Pennington*. Although its recommendations may ultimately be adopted by governmental bodies, the WFCA itself is *not* a public body. The WFCA's decision to adopt a regulation or rule does not make it law. There are no public policy justifications for extending *Noerr-Pennington* immunity to petitioning of private standards-setting organizations. On the contrary, there are many compelling reasons for not extending the *Noerr-Pennington* doctrine to protect Joor's petitioning of the WFCA.

In its cross-petition Joor argues that application of *Noerr-Pennington* immunity hinges on whether the petitioning was consistent with the WFCA's rules. If it was, Joor suggests, the integrity of the WFCA's decision-making process is validated and the *Noerr-Pennington* doctrine should be applied. This argument is flawed. As petitioner has already pointed out, Joor in fact did manipulate the Article 79 Subcommittee process to Southwest's disadvantage. The "subversion" of procedural fairness and associational rules may have been more blatant in *Indian Head* than it was below. Nevertheless, the prejudice that Southwest suffered—and the harm to competition in the underground storage tank repair industry—is unmistakably clear. Joor simply glosses over not only the specific facts below but also the question they ultimately raise: Given the inherent potential for anticompetitive abuse, why should petitioning of a private standards-setting organization enjoy *Noerr-Pennington* immunity—especially when

competition is demonstrably harmed by the organization's rule-making process?

Other than this disagreement with Joor's presentation of the issues presented for review, Southwest believes that, in all respects save one, its petition is fully responsive to Joor's cross-petition.

B. Even Assuming That The *Noerr-Pennington* Doctrine Immunizes Joor's Petitioning Of The WFCA, The Sham And Co-Conspirator Exceptions To The Doctrine Were Satisfied

Like Joor, Southwest believes that the Ninth Circuit's application of the "sham" exception to the *Noerr-Pennington* doctrine incorrectly distinguishes between legislative and adjudicative action. Unlike Joor, and the Ninth Circuit below, Southwest believes that in the particular circumstances of this case, the sham exception encompasses misrepresentations made when pursuing "legislative" action. As pointed out in Southwest's petition, Joor submitted false information relating to the purported need to remove leaking tanks from the ground before repairing them. Southwest was not given an opportunity to rebut this misleading data. In this case, the sham exception was satisfied by the submission of false information. *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1260-61 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227, 103 S. Ct. 1234 (1983); *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168 (D. Del. 1979).

Southwest also believes that Joor's petitioning of the WFCA falls within the "co-conspirator" exception to the *Noerr-Pennington* doctrine. Below, Joor admitted it provided "hospitality and promotional gifts" to WFCA members. Southwest also introduced evidence that Joor

had extensively entertained members of the Los Angeles and San Diego Fire Departments. The fire department officials were responsible for issuing underground storage tank repair permits in Los Angeles and San Diego. (CR 53, Exhibits 21, 22.) In California, state law enjoins the receipt of consideration by an official in the course of pursuing his normal official duties. *See Byrne v. State Personnel Board*, 179 Cal. App. 2d 576, 4 Cal. Rptr. 32 (1960).

Besides the entertainment and gifts, there is other evidence demonstrating that Joor colluded with the WFCA and fire officials to inflict competitive harm on Southwest and on the tank lining industry. For example, a letter on WFCA stationery from WFCA employee R. V. Christoffersen to Joor president Howard Robbins says:

> Thank you for your letter with the comments on the Article 79 Subcommittee meeting. It has been copied and forwarded to the WFCA Uniform Fire Code Committee.
>
> I am looking forward to seeing you in March and *trust you will come loaded for bear.* The "*tank liners*" will be out in force and Forrest Ray won't be around to *help carry the battle.*

(CR 53, Exhibit 23) (emphasis added). The clear import of this letter is that the WFCA employee who authored it concerted with Robbins to combat and defeat the interests of Joor's competitors, the "tank liners", like Southwest.

Moreover, in a letter he wrote to Los Angeles Fire Department official John Hall concerning tank lining, Robbins implored: "[p]lease do not *expose me* any more than necessary." (CR 53, Exhibit 24.) This letter strongly

suggests that Robbins' contacts with fire officials and members of the WFCA needed to be kept secret in order to conceal the conspiracy against Southwest.

As the Ninth Circuit noted in *Clipper Exxpress*, "[c]onspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression." 690 F.2d at 1252 n.17. Joor's actions below came within this co-conspirator exception to the *Noerr-Pennington* doctrine. *See also Harman v. Valley National Bank of Arizona,* 339 F.2d 564, 566 (9th Cir. 1964); *In re Airport Car Rental Antitrust Litigation,* 521 F. Supp. 568, 588 (N.D. Cal. 1981), *aff'd*, 693 F.2d 84 (9th Cir. 1982), *cert. denied sub nom. Budget Rent-A-Car of Washington-Oregon, Inc. v. Hertz Corp.*, 462 U.S. 1133, 103 S. Ct. 3114 (1983); *Affiliated Capital Corp. v. City of Houston,* 735 F.2d 1555 (5th Cir. 1984), *cert. denied sub nom. Gulf Coast Cable Television Co. v. Affiliated Capital Corp.*, 474 U.S. 1053, 106 S. Ct 788 (1986); *Miami International Realty Co. v. Town of Mt. Crested Butte,* 1984-2 Trade Cas. (CCH) ¶ 66,166 (D. Colo. 1984).

C. Conclusion

For the reasons set forth above and in its petition, Southwest respectfully requests that its petition be granted.

Dated: March 28, 1988.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on March 28, 1988, I served the within *Petitioner's Reply to Cross-Petition* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
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(Original and forty copies)

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San Diego, California 92101

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 28, 1988, at Los Angeles, California.

Siri Ved K. Khalsa
(Original signed)